No. 87-636-CFX
Status: GRANTED

Title: Efthimios A. Karahalios, Petitioner
v.
National Federation of Federal Employees, Local 1263

Docketed:
October 7, 1987

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Duffy,Thomas R.

Counsel for respondent: Gordon,H. Stephan

Entry	Date	Note	Proceedings and Orders
1	Oct 7 1987	G	Petition for writ of certiorari filed.
3	Nov 4 1987		Order extending time to file response to petition until November 23, 1987.
5	Nov 23 1987		Brief of respondent Local 1263 in opposition filed.
4	Nov 24 1987		DISTRIBUTED. December 11, 1987
8	Dec 9 1987	X	Reply brief of petitioner Efthimois A. Karahalios filed.
7	Dec 14 1987	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
9	May 11 1988		Brief amicus curiae of United States filed.
10	May 17 1988		REDISTRIBUTED. June 2, 1988
11	Jun 6 1988		Petition GRANTED.
			**********
13	Jun 11 1988		Order extending time to file brief of petitioner on the merits until August 20, 1988.
14	Aug 18 1988		Joint appendix filed.
15	Aug 18 1988		Brief of petitioner Efthimois A. Karahalios filed.
17	Aug 24 1988		Order extending time to file brief of respondent on the merits until October 20, 1988.
18	Sep 8 1988	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
19	Sep 15 1988		Record filed.
		*	Certified C. A. proceedings, original record and transcripts, 7 volumes, received. (BOX).
20	Oct 3 1988		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
21	Oct 20 1988		Brief amicus curiae of National Treasury Employees Union filed.
22	Oct 20 1988		Brief amicus curiae of United States filed.
23	Oct 20 1988		Brief of respondent National Federation of Federal Employees, Local 1263 filed.
24	Oct 24 1988		SET FOR ARGUMENT. Tuesday, January 17, 1989. (2nd case) (1 hr.)
25	Nov 4 1988		CIRCULATED.
26	Nov 9 1988	G	Application (A88-378) to extend the time to file a reply brief from November 19, 1988 to November 23, 1988, submitted to Justice O'Connor.
27	Nov 10 1988		Application (A88-378) granted by Justice O'Connor extending the time to file until November 23, 1988.
28	Nov 23 1988	X	Reply brief of petitioner Efthimois A. Karahalios filed.
29	Jan 17 1989		ARGUED.

87-636

No. 87-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

EFTHIMIOS A. KARAHALIOS,

Petitioner,

v.

DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, PRESIDIO OF MONTEREY, and LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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October 5, 1987

QUESTION PRESENTED FOR REVIEW

Does a federal employee whose union has breached its duty of fair representation have a cause of action against the union for damages which may be brought in federal district court; or is the employee relegated to seeking administrative relief before the Federal Labor Relations Authority?

LISTS OF PARTIES TO THE PROCEEDINGS

The plaintiff-petitioner in this case is Efthimios A. Karahalios.

The defendant-respondent in this case is Local 1263, National Federation of Federal Employees. An additional defendant below, Defense Language Institute/Foreign Language Center, Presidio of Monterey is not a party which has an interest in the outcome of this petition.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

EFTHIMIOS A. KARAHALIOS,

Petitioner,

v.

DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, PRESIDIO OF MONTEREY, and LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Efthimios Karahalios prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit. The court of appeals held that an employee of a federal agency could not sue his union for breach of the duty of fair representation in federal district court. The appellate court found that such suits were pre-empted by passage of Title VII of the Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. Sections 7101-7135, and reversed the federal district court's judgment in favor of Karahalios.

The district court held that, by analogy to *Vaca v. Sipes*, 386 U.S. 171 (1967), causes of action for breach of the duty of fair representation for employees in the federal sector were an exception to the pre-emption doctrine, and were not pre-empted by the CSRA. After the trial, the district court found that the union was guilty of three separate breaches of the duty of fair representation.

OPINIONS BELOW

The opinion of the court of appeals is reproduced in Appendix A to this petition. The opinions of the U.S. District Court for the Northern District of California have been reported as *Karahalios v. Defense Language Inst.*, 534 F. Supp. 1202 (N.D.Cal. 1982) (*Karahalios I*), *Karahalios v. Defense Language Inst.*, 544 F. Supp. 77 (N.D.Cal. 1982) (*Karahalios II*), and *Karahalios v. Defense Language Inst.*, 613 F. Supp. 440 (N.D.Cal. 1984) (*Karahalios III*).

JURISDICTION

The decision of the court of appeals was entered on July 13, 1987. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1). This petition is filed within ninety (90) days after the entry of decision

of the court of appeals, pursuant to 28 U.S.C. Section 2101(c) and Rule 20.2, Rules of the United States Supreme Court.

STATUTORY PROVISIONS INVOLVED

This case involves the general federal question jurisdiction statute, 28 U.S.C. Section 1331, and Title VII of the Civil Service Reform Act of 1978 (Federal Service Labor-Management and Employee Relations Statute) ("CSRA"), 5 U.S.C. Sections 7101 *et seq.*

STATEMENT OF THE CASE

The issue in this case is whether a federal employee whose union has breached its duty of fair representation may sue the union in federal district court for the damages caused by the union's breach.

In 1976, petitioner Efthimios A. Karahalios was a Greek language instructor at the Defense Language Institute (DLI) in Monterey. He had worked for DLI for almost 20 years, and his work had been highly praised. When a higher position (course developer) became available at a substantial increase in pay and prestige, Karahalios (a non-union member, but part of the collective bargaining group) went through the

competitive civil service selection process, and was awarded the job.

Karahalios performed competently in the job for over a year. In the interim, another employee, Simon Kuntelos, who had declined to go through the selection process by which Karahalios was selected, filed a grievance alleging that Kuntelos should have been given the course developer job. Kuntelos (a union board member) requested that the union arbitrate his grievance.

The union decided to arbitrate for Kuntelos without giving Karahalios notice that it was considering doing so; without considering Karahalios' qualifications for the job; and without taking into account the effect which the arbitration might have on Karahalios' job.

When the Kuntelos arbitration took place, the union failed to give Karahalios notice of the hearing, or the opportunity to be present. Even though Karahalios was not a party to the arbitration, had not been given notice of the hearing, and was not present at the hearing, and even though Karahalios had been performing competently in the job for over a year, the arbitrator decided that Karahalios' job should be "reconstituted", which meant that Kuntelos could, after

the fact, go through the competitive selection process for Karahalios' job.

Kuntelos went through the selection process under radically different conditions than Karahalios. He was the only one being tested (test was not being given anonymously), and was given almost twice as long to take the test. He scored in the same grade class ("qualified") as Karahalios, was selected for the job, and Karahalios was demoted.

Karahalios objected to the process by which he was deprived of his job. He filed grievances with the employer which were denied. Then he asked the union to arbitrate on his behalf, which decided not to arbitrate, without any consideration of the merits of Karahalios' case. The union decided that it could not consider arbitrating Karahalios' grievances as it had a "conflict of interest" due to its earlier participation in the Kuntelos arbitration.

Karahalios then attempted to arbitrate his grievances with the employer, which declined on the basis that only the union could request arbitration, not the employee.

Karahalios then filed unfair labor practice charges with the Federal Labor Relations Authority (FLRA).

The FLRA General Counsel ruled that the union had violated its duty of fair representation and ordered a complaint issued against the union.

However, the FLRA and the union subsequently entered into a settlement with the union whereby the union simply agreed to post a notice indicating that it would not undertake similar acts in the future. Karahalios objected to the settlement, as it did not address the damages done to him by the union. He later unsuccessfully appealed the settlement to the FLRA General Counsel.

Karahalios then filed this lawsuit in federal district court. Prior to trial, the United States District Court for the Northern District of California held that, by analogy to the NLRA setting under *Vaca v. Sipes*, 386 U.S. 171 (1967), the district court had jurisdiction of the duty of fair representation claim. *Karahalios I*, 534 F.Supp. 1202, 1208 (N.D.Cal. 1982).

After trial, the district court found that the union had breached its duty of fair representation to Karahalios in three separate instances: (1) deciding to arbitrate on behalf of Kuntelos for Karahalios' job without notifying Karahalios, (2) failing to provide Karahalios notice of the arbitration, and (3) refusing to arbitrate for Karahalios without considering the merits

of his claim. *Karahalios III*, 613 F.Supp. 440, 446-47 (N.D.Cal. 1984). The court did not award back pay because it could not find Karahalios had a "clear edge" over Kuntelos[1], *Id.* at 449, but did award Karahalios his attorneys' fees. *Id.* at 449-51.

The U.S. Court of Appeals for the Ninth Circuit reversed, holding that, by passing the CSRA, Congress intended to prevent a federal employee from suing his union for breach of the duty of fair representation in federal court, as the employee could bring his case before the Federal Labor Relations Authority.

This petition for a writ of certiorari followed.

[1]The extent of damages awarded by the trial court was the subject of a cross-appeal to the Ninth Circuit. Inasmuch as the Ninth Circuit found that no jurisdiction existed to hear plaintiff's claim, the damages issue has not yet been addressed.

REASONS FOR GRANTING THE WRIT

I. The Decisions of the Courts of Appeal Are Completely Divided On This Issue; Decisions of the Tenth Circuit and the Fourth Circuit Directly Conflict With Decisions Of The Eleventh Circuit, The Ninth Circuit and The Third Circuit.

This case raises an issue of importance to every federal employee involved in the collective bargaining process: when a union breaches its duty of fair representation, can the employee injured by the union's actions sue the union for damages in federal district court (a right which every employee subject to the National Labor Relations Act has); or did Congress intend by passage of the Civil Service Reform Act of 1978 that unions of federal employees (unlike unions of non-federal employees) should be shielded from employee damage actions in district courts? The five federal courts of appeal which have considered this issue are squarely in conflict.

The Tenth Circuit holds that an employee may sue his union when it breaches its duty of fair representation, finding that this case is no different than *Vaca v. Sipes*, 386 U.S. 171 (1967). *Pham v. American Fed'n of Gov't Employees, Local 916*, 799 F.2d 634,639 (10th Cir. 1986). This rule also obtains in the

Fourth Circuit, which affirmed without opinion a district court's holding in *Naylor v. American Fed'n of Gov't Employees, Local 446*, 580 F.Supp. 137 (W.D.N.C. 1983), that it had jurisdiction to hear a federal employee duty of fair representation suit. *Naylor v. American Fed'n of Gov't Employees, Local 446*, 727 F.2d 1103 (4th Cir. 1984), *cert. denied*, 469 U.S. 850 (1984).

In contrast, the Eleventh Circuit holds that passage of the CSRA demonstrated Congressional intent to pre-empt federal employee duty of fair representation actions from the district courts, and that no jurisdiction exists in the district court to consider such claims. *Warren v. Local 1759, American Fed'n of Gov't Employees*, 764 F.2d 1395, 1399 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 527 (1985). The Ninth Circuit in the present case is in accord with this view. Similarly, the Third Circuit has affirmed in an unreported memorandum decision a district court's holding that it lacked jurisdiction to hear the employee's claim in this situation. *Wilson v. United States Bureau of Prisons*, Case No. 84-5735 (3d Cir. 1985) (unreported memorandum decision), *affirming* Case No. 83-0805 (M.D.Pa. 1984) (unreported memorandum order).

The issue of whether an employee may bring a cause of action against his union in district court is

squarely presented in this case, especially since here there has been a decision on the merits that the union was guilty of multiple breaches of the duty of fair representation. *Karahalios III*, 613 F.Supp. 440, 446-47 (N.D.Cal. 1984). Thus a complete record is available here for the Court to review.

II. Review By This Court Is Necessary To Provide Uniform Administration Of the Federal Labor Relations System Regarding The Remedies Available To An Employee Injured By His Union's Conduct.

Whether a union operating in the federal arena should be shielded from liability for its misconduct towards one of the members of its bargaining group is an issue which rests at the core of the federal labor relations system, and literally affects hundreds of thousands of employees in the federal government.

Is the injured employee relegated to complaining to the Federal Labor Relations Authority, an administrative agency which has been criticized for not vigorously enforcing the duty of fair representation? Broida, *Fair Representation for Federal Employees : An Overview*, 30 Fed. Bar News & J. 440, 442 (1983) In this case, for example, the FLRA remedy only impacted the future behavior of the union -- it provided no

redress whatsoever for the harms suffered by Karahalios.

Or, on the other hand, is the federal employee entitled to redress his grievances against his union in the same manner as an employee in the NLRA framework, i.e., by a lawsuit in a federal district court, a forum which is designed to focus on the harm done to the individual, not an administrative agency such as the FLRA which may well be more concerned with fashioning system-wide remedies at the expense of the individual employee?

This Court has repeatedly emphasized that the right of the employee to be made whole is of paramount importance in the administration of the labor relations system. *Bowen v. United States Postal Service*, 459 U.S. 212, 222 (1983); *Vaca v. Sipes*, 386 U.S. 171, 185-86. As Mr. Justice White noted in *Vaca*:

> "The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation." 386 U.S. at 183.

These same policy concerns are no less present for a federal employee than for a postal worker, a steelworker, or a railroad worker. The FLRA's attention is centered upon administrative remedies, not the harm done to the individual employee. Even if the FLRA finds that the union breached its duty of fair representation to the employee (as it did here), the FLRA's administrative remedy is not necessarily devised to right the wrong done to the employee. The only forum designed to redress these grievances is the federal district court.

CONCLUSION

The issue in this case is important to the basic conceptual framework of the federal labor relations system. The circuit courts of appeal are squarely in conflict on this issue. The only way in which to bring uniformity to the federal labor system is review by this Court.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EFTHIMIOS A. KARAHALIOS,

Plaintiff-Apellee/
Cross-Appellant.

v.

DEFENSE LANGUAGE INSTITUTE/
FOREIGN LANGUAGE CENTER
PRESIDIO OF MONTEREY,

Defendant,

Local 1263, National Federation
of Federal Employees,

Defendant-Appellant/
Cross-Appellee.

Nos. 85-1602;
85-1626;
86-2006

D.C. No.

CV-81-2745-RFP

OPINION

Argued and Submitted
April 16, 1987 -- San Francisco, California

Filed July 13, 1987

Before: Procter Hug, Jr., Dorothy W. Nelson and
John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan

Appeal from the United States District Court
for the Northern District of California
Robert F. Peckham, District Judge, Presiding

COUNSEL

Thomas R. Duffy, and Richard De Stefano, Beverly Hills, California, for the plaintiff-appellee/cross-appellant.

Patrick J. Riley, Washington, D.C., for the defendant-appellant/cross-appellee.

Stuart A. Kirsch, College Park, Georgia, for amicus curie.

OPINION

NOONAN, Circuit Judge:

Efthimios A. Karahalios brought suit against the Defense Language Institute/Foreign Language Center Presidio of Monterey (DLI) and Local 1263, National Federation of Federal Employees (the Union). The original incident occurred in 1976. The suit against DLI has been settled. Karahalios and the Union both

appeal from the judgment of the district court. The case presents a question of first impression in this circuit as to whether a district court has jurisdiction to entertain an action by a federal employee against his union. Holding jurisdiction does not exist, we reverse.

FACTS AND PROCEEDINGS

In 1976 Karahalios was a Greek language instructor at DLI when a higher position, "Course Developer," was reopened. This position had been held by Simon Kuntelos, who had been demoted to instructor when the position had been closed. Kuntelos believed he was entitled to non-competitive promotion back to his old job and declined to participate in the competitive examination required by DLI. Karahalios took the examination and was made course developer.

Kuntelos complained to the Union which, without telling Karahalios, brought a grievance on Kuntelos's behalf. As a result, an arbitrator decided that Kuntelos should be considered. Kuntelos then took the

examination, was given substantially more time to complete it than had been afforded Karahalios and received a grade of 83 as compared to Karahalios' 81. Kuntelos was appointed course developer and Karahalios was demoted. Kuntelos's success was short-lived, however: he was appointed in May 1978, and the position was dropped in October 1979.

Karahalios objected to his demotion and filed grievances with DLI which were denied. The Union refused to take his grievances to arbitration on the ground that, since it had represented Kuntelos, it had a conflict of interest. Karahalios then filed unfair labor practice charges with the Federal Labor Relations Authority (FLRA). FLRA's General Counsel ruled that the Union had violated its duty and ordered a complaint issued against the Union. But the Union and the regional director of the FLRA settled, with the Union simply agreeing that in the future it would not inform employees that it could not represent more than one employee seeking the same position. Karahalios derived

no benefits from the settlement, which he unsuccessfully appealed to the General Counsel.

Karahalios then filed suit in the district court against both DLI and the Union, alleging that DLI had breached the collective bargaining agreement and that the Union had breached its duty of fair representation. In the first of its three published opinions in this case, the district court held that, while it lacked jurisdiction over the claim against DLI, Karahalios' claim against the Union posed a federal question and the FLRA's jurisdiction was not exclusive. *Karahalios v. Defense Language Inst.*, 534 F. Supp. 1202, 1208 (N.D. Cal. 1982) (*Karahalios I*). The court noted that, just as the NLRB was more concerned with broad questions of policy than with individual rights, so was the FLRA. The court declared, "Plaintiff, then, lacks an adequate administrative remedy as did the petitioner in *Vaca v. Sipes*." *Karahalios I*, 534 F.Supp. at 1208.

Karahalios II held that the court would not assume pendent jurisdiction over Karahalios's claim against DLI

for breach of the collective bargaining agreement. *Karahalios v. Defense Language Inst.*, 544 F. Supp. 77, 78 (N.D. Cal. 1982). *Karahalios III* found that the Union had breached its duty of fair representation by (1) deciding to arbitrate on behalf of Kuntelos without consultation with Karahalios, (2) failing to notify Karahalios of the arbitration, and (3) refusing to arbitrate for Karahalios without considering the merits of his claim. *Karahalios v. Defense Language Inst.*, 613 F. Supp. 440, 446-47 (N.D. Cal. 1984). The court further held that it could not determine Karahalios's damages because he and Kuntelos "were simply too evenly matched for the court to find that plainifff had a clear edge." *Id.* at 449. The court did award Karahalios attorney's fees of $35,000 on the theory that the Unions' breach of duty had caused Karahalios to litigate and on the further theory that Karahalios's suit had been of benefit to the Union and all its members. *Id.* at 449-51.

The Union appeals the rulings against it; Karahalios appeals the denial of damages.

ANALYSIS

Several issues are presented by the appeal, but the jurisdictional issue is dispositive. As the issue is one of law, we review de novo. *South Delta Water Agency v. Department of Interior*, 767 F.2d 531, 535 (9th Cir. 1985). On the question of jurisdiction there is a present split of authority. Compare *Pham v. American Fed'n for Gov't Employees, Local 916*, 799 F.2d 634 (10th Cir. 1986) with *Warren v. Local 1759 Am. Fed'n of Gov't Employees*, 764 F.2d 1395, 1399 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 527 (1985). Resolution of the conflict depends on interpretation of the Title VII of the Civil Service Reform Act of 1978, (CSRA) 5 U.S.C. Sections 7101-7135, in the light of *Vaca v. Sipes*, 386 U.S. 171 (1976) and other statutes enacted by Congress dealing with the rights of employees and unions.

Interpreting the Labor Management Relations Act, the Supreme Court in *Vaca* held that where a union arbitrarily refused to process a grievance, the injured

employee had a right to sue the union in the district court. The Court refused to believe that Congress intended to confer upon unions "unlimited discretion to deprive injured employees of all remedies for breach of contract." 386 U.S. at 186. The Court bolstered its reasoning by pointing to the possibility of actions in the district court under Section 301 and Section 303 of the Labor Management Relations Act (29 U.S.C. Sections 185, 187). Congress, the Court noted, had not meant to give the NLRB exclusive jurisdiction. *Id.* at 179.

There is no statutory provision analogous to Section 301 or Section 303 under the CSRA, and as there has been no waiver of immunity by the United States, the government could not be sued by a federal employee. But this difference alone would not justify us in concluding that the basic rationale of *Vaca* does not speak here. In the absence of other indication of congressional intent, we would hold here, too, that Congress has not intended to confer upon unions unlimited discretion.

When Congress enacted the CSRA the federal courts had implied a duty of fair representation not only under the National Labor Relations Act as in *Vaca*, but also under the Railway Labor Act. *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944). Aware of these decisions and aware of how important *Steele*, the seminal case, had been in protecting the rights of racial minorities, Congress itself imposed the duty of fair representation on federal unions. But, aware of the decisions, Congress also failed to provide jurisdiction in the federal courts to enforce the duty.

Argumentum ex silentio is normally weak, though sometimes helpful. Here the silence of Congress appears to be deliberate. The House version of the Civil Service Reform Act authorized "any party to a collective bargaining agreement," aggrieved by the other party's failure to arbitrate, to file a petition in the appropriate district court for an order that arbitration proceed. *H.R. Rep. No. 95-1403, 95th Cong., 2d Sess.* 286 (1978). The Senate version of the Act did

not contain this jurisdictional grant. The Conference Committee rejected the provision in the House bill, stating, "All questions of this matter will be considered at least in the first instance by the Federal Labor Relations Authority." *H.R. Rep. No. 95-1717, 95th Cong., 2d Sess.* 157 (1978) *reprinted in* 1978 U.S. Code Cong. & Admin. News 2860, 2891. It is true that the provision which the Conference Committee eliminated did not deal with the claim of an employee against his union. But it is also true that the enforcement scheme chosen by Congress showed a strong preference for keeping the interpretation and enforcement of collective bargaining agreements within the process of arbitration, to be reviewed in the first instance by the FLRA. *See generally* Comment, *Federal Sector Arbitration Under the Civil Service Reform Act of 1987*, 17 San Diego L. rev. 857 (1980). Judicial review of a final order of the FLRA is assured by the statute. 5 U.S.C. Section 7123.

There is more than silence on the part of Congress. In the statute at bar there is an express

provision that "a labor organization which has been accorded exclusive recognition...is responsible for representing the interest of all employees in the unit it represents without discrimination." 5 U.S.C. Section 7114(a)(1). The statute goes on to give the FLRA the power to remedy a breach of this duty by awarding back pay against a union that has breached its duty. 5 U.S.C. Section 7118(a)(7). There is a fit between the duty and the remedy provided.

True, the FLRA has been criticized for not enforcing the duty of fair representation vigorously enough. Broida, *Fair Representation for Federal Employees: An Overview*, 30 Fed. Bar News & J. 440, 442 (1983). However, the General Counsel received only 270 cases of complaints against labor organizations in fiscal 1985 and only 227 in fiscal 1986, representing respectively 6.6 percent and 4.4 percent of the complaints received by his offices. The General Counsel in 1986 dismissed 49 percent of these charges

and 25 percent were withdrawn; 13 percent were settled. The General Counsel issued 31 conplaints. FLRA, *Report on Case Handling Developments of the Office of the General Counsel*, FLRA Doc. 1335 (Feb. 1987) pp. 39 and 53. It is of course open to interpretation whether the small number of complaints actually issued reflects lack of zeal or lack of real problems in this area. We have insufficient evidence to conclude that the FLRA does an inadequate job in protecting the rights of the individual worker in relation to a federal union.

In the present case, it is evident that the FLRA preferred a settlement with implications for all employees in the future to making Karahalios whole. The facts of this case, on the other hand, indicate that the existence of a district court remedy after investigation and issuance of a complaint by the General Counsel may lead to a tortuous path of litigation whcse costs are disproportionate to the individual benefit achieved and whose protracted twists

and turnings must be as disheartening to any eventual winner as they are to any eventual loser. In summary, whether the microcosm of this case is studied or whether the general practice of the FLRA is reviewed, no strong reason appears to overturn what seems to be the congressional intent to channel the grievances of federal employees to the Federal Labor Relations Authority.

A paradox: where Congress recognized no duty on a union's part the courts shaped a remedy more potent than the remedy here provided by a statute. The paradox arises because where Congress created the duty it also tempered the remedy. Judicial creativity was thus restrained. We must act within the statutory scheme.

The judgment appealed from is Reversed. The case is Dismissed.

(2)

No. 87-636

IN THE
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OCTOBER TERM 1987

EFTHIMIOS A. KARAHALIOS,

Petitioner,

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DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, OF MONTEREY, AND LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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1988

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QUESTION PRESENTED

Do the federal district courts have jurisdiction over claims brought by federal employees covered by the Civil Service Reform Act who allege a breach of the duty of fair representation?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

EFTHIMIOS A. KARAHALIOS,

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DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, OF MONTEREY, AND LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

This case presents the question of whether federal district courts have jurisdiction to hear a claim of breach of the duty of fair representation brought by an individual federal employee, whose claim is covered by the Civil Service Reform Act, 5 U.S.C. §7114(a)(1). The question is whether the Federal Labor Relations Authority (FLRA) has exclusive domain over such claims. In the private sector, the duty has been implied from the National Labor Relations Act. In the federal sector this duty is explicit.1/ Petitioner does not challenge that such claims are cognizable before the FLRA; rather, he asserts that a subsequent action may lie in district court if he is not satisfied with the relief granted by the FLRA. 2/

In the federal sector, the duty is enforced through the unfair labor

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1/ "A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." §7114(a)(1).

2/ Respondent NFFE Local 1263 vigorously disputes the claim that it breached the duty of fair representation owed Karahalios. The merits of the claim were not addressed by the Ninth Circuit, which dismissed on jurisdictional grounds.

practice (ULP) mechanism. 3/ It is an unfair labor practice for a labor organization "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter," or "to otherwise fail or refuse to comply with any provision of this chapter [Chapter 71 of Title 5 of the United States Code]." 5 U.S.C. §7116(b)(1) and (8).

When a federal employee believes his union has not represented his interests fairly, he must file a ULP charge with the FLRA. The FLRA General Counsel, who is similar to the NLRB General Counsel, must investigate and either issue a complaint against the union or dismiss the charge. 5 U.S.C. §7118(a)(1). If a complaint is issued and not settled, the respondent has a right to answer and participate in a hearing before an administrative law judge. 5 U.S.C. §7118(a)(3),(5) and (6). 5 U.S.C. §7105(e)(2). If a ULP violation is found, the ALJ shall order the union to pay backpay, if necessary, in accordance with 5 U.S.C.§5596(b); or to take "such other action as will carry out the purpose of this chapter." 5 U.S.C. §7118(a)(7). The findings and orders of the ALJ are reviewable by the FLRA. 5 U.S.C. §7105(f).

Simply stated, this case involves two men and one job; both men sought a promotion to that single position. Simon Kuntelos and Efthimios Karahalios were Greek language instructors at the Defense Language Institute in Monterey, California (hereafter the Institute). Kuntelos became employed with the Institute in 1948; Karahalios in 1958. In 1963 Kuntelos was promoted to course developer, a position he held until 1971 when it was abolished as a result of a reorganization. Kuntelos was reduced in rank and reassigned as a foreign language instructor.

In 1976 a new position was created. Kuntelos was listed as the sole "best qualified" candidate, based on a list of persons eligible for repromotion to this position. Based upon being "best qualified" and his status as eligible for repromotion, Kuntelos believed he was entitled to be selected non-competitively. Instead of selecting Kuntelos

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3/ Likewise, a federal employer's refusal to abide by a provision of the collective bargaining agreement or by an arbitration award is only redressable through the ULP procedure. *Columbia Power Trades v. U.S. Department of Energy*, 671 F. 2d 325 (9th Cir. 1982); *Yates v. U.S. Soldiers' and Airmen's Home*, 553 F. Supp 461 (D.D.C. 1982)

automatically, the Institute's selecting official requested a competitive list of candidates. In connection with his evaluation under competitive procedures, Kuntelos was asked by the institute to take a teaching knowledge test. He objected and declined to take the test. Karahalios was the only employee who took the test and he was selected for the position in April, 1977.

Kuntelos filed a grievance, alleging a violation of the collective bargaining agreement and of government regulations. On August 7, 1977 Arbitrator Alvin Goldman sustained the grievance and ordered that the course developer position be declared vacant. The arbitrator held that Kuntelos' rights to a non-competitive selection had been violated. In connection with filling the position anew, Kuntelos took the teaching knowledge test, although he believed that this requirement violated the arbitrator's award. Kuntelos scored 83 and he and Karahalios, who had earlier scored 81, were referred to the selecting official. Kuntelos was selected and Karahalios was reduced in rank and reassigned to his former position on May 5, 1978. In October 1979, the course developer position was again abolished and Kuntelos was reassigned back to an instructor position.

Karahalios filed two grievances and was represented by NFFE Local 1263. After his grievance was denied at the ultimate step of the grievance procedure, he requested that the Local invoke arbitration. The grievance file was reviewed by Local 1263's outside counsel, Saul Weingarten, who advised the Local that Karahalios' grievances lacked merit and that in any event a conflict of interest existed since the union had already successfully arbitrated Kuntelos' grievance over the filling of the course developer position. On January 9, 1979 the Union Executive Board convened to decide whether to invoke arbitration on behalf of Karahalios. Board members reviewed both arbitrator Goldman's decision and attorney Weingarten's opinion. The Board unanimously decided that invoking arbitration on Karaholios' grievances would be inconsistent with its successful arbitration of the Kuntelos grievance. Karahalios was informed of the decision by letter.

Karahalios filed a ULP against the Institute and the union for refusing to arbitrate the grievances. The Regional Director of the FLRA dismissed both charges. Karahalios appealed to the FLRA's General Counsel who reversed the Regional Director's ruling only with respect

to the charge against the union. The General Counsel found that grounds existed for pursuing a complaint against the union for breach of its duty of fair representation under 5 U.S.C. §7114(a)(1) and §7116(b)(1) and (8). Once the matter was returned to the Regional Office the Union agreed to a settlement. The Union agreed to post a notice to all members stating that it would not discriminate among bargaining unit members. Because the settlement provided no personal or monetary relief for Karahalios, he protested the settlement to the General Counsel. After the General Counsel upheld the settlement agreement, Karahalios filed the instant lawsuit.

REASONS FOR DENYING THE PETITION.

1. CONGRESS INTENDED THAT THE FLRA WOULD HAVE EXCLUSIVE JURISDICTION OVER DUTY OF FAIR REPRESENTATION ACTIONS BROUGHT BY FEDERAL EMPLOYEES AGAINST THEIR EXCLUSIVE REPRESENTATIVES.

The contours of labor relations in the federal sector were laid down by the Civil Service Reform Act of 1978, Pub.L. 95-454 (CSRA or the Reform Act). The CSRA created the Federal Labor Relations Authority (FLRA), an independent executive branch body which performs a role in the federal sector analogous to that of the National Labor Relations Board in the private sector. *See H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 41 (1978)*. Among its powers, the FLRA adjudicates negotiability disputes, determines appropriate bargaining units, supervises representational elections, resolves exceptions to arbitration awards and resolves unfair labor practice complaints. 5 U.S.C. §7105.

By the time the CSRA was enacted, the duty of fair representation was a recognized facet of federal labor law. *See Steele v. Louisville and Nashville Railroad*, 323 U.S. 192 (1944); *Vaca v. Sipes*, 386 U.S. 171 (1967). In enacting the CSRA, Congress was cognizant of the development of this doctrine, and in a sharp departure from private sector law, codified this duty in the statute governing labor relations in the federal sector. 5 U.S.C. §7114(a)(1),

clause 2. 4/ It is an unfair labor practice for a union to violate this duty. 5 U.S.C. §7116(b)(8). Correspondingly, and in contrast to private sector law, complaints of breaches of this duty must be resolved exclusively through the procedures of the Reform Act. 5/ Contrary to Karahalios' arguments, a federal employee who feels his union has violated the duty of fair representation is limited to the unfair labor practice procedure, which provides for review by a circuit court. *See* 5 U.S.C. §7123.

The CSRA permits judicial intervention into labor relations matters in only three instances. The FLRA may seek enforcement of its adjudicatory orders in the federal courts of appeals. 5 U.S.C. §7123(b). Aggrieved persons, including unions and federal agencies, may seek judicial review of any final FLRA decision in those same courts. 5 U.S.C. §7123(a). Finally, upon issuance of an unfair labor practice complaint, the FLRA may petition a federal district court for temporary injunctive relief. 5 U.S.C.§7123(d).

Notably absent is an analogue to §301 of the Taft-Hartley Act, 29 U.S.C. §185, which allows unions to sue and be sued in federal district court. The absence of such a provision was critical to the outcome in *Warren v. Local 1759, American Federation of Government Employees*, 764 F.2d 1395, 1398 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 527 (1985), and in the decision of the Ninth Circuit, Pet. for Cert., 9a, which held that the FLRA had exclusive jurisidiction over these claims. The Ninth Circuit recognized that the House version of the Reform Act, which authorized "any party to a collective bargaining agreement," aggrieved by the other party's failure to arbitrate, to file a claim in District Court, did not prevail. The Conference Committee rejected the provision in the

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4/ This Court has consistently declined to rule on whether the NLRB correctly held in *Miranda Fuel Co.*, 140 NLRB 181, *enforcement denied*, 326 F.2d 672 (2d Cir. 1963) that all breaches of the duty of fair representation are ULPs. *DelCostello*, 462 U.S.151 text at n. 22.

5/ The existence of the statutory duty of fair representation is one of many differences between the federal and private sector schemes. Under the Reform Act, there is a statutory management rights clause, which restricts the scope of bargaining, §7106(a); a prohibition on the right to strike §7120(f); a right to official time for negotiations, §7131(a); a right to dues withholding, §7114, but there is no right to any form of compulsory union membership.

House bill stating, "All questions of this matter will be considered at least in the first instance by the Federal Labor Relations Authority." H.R. Rep. No.95-1717, 95th Cong., 2d Sess. 157 (1978) *reprinted in 1978 U.S. Code Cong. & Admin. News 2860, 2891.*

These decisions are consistent with a series of cases which have consigned federal unions' claims for contract enforcement exclusively to the FLRA, even though these claims would be judicially enforceable if they involved private sector unions. In *Columbia Power Trades Council v. United States Department of Energy*, 671 F.2d 325 (9th Cir. 1982), the court held that it had no jurisdiction over a suit seeking mandamus of an agency administrator to implement an arbitrator's award. The court held that the FLRA had the exclusive power to enforce an arbitration award in favor of federal employees. In *Yates v. U.S. Soldiers' and Airmen's Home*, 553 F. Supp. 461 (D.D.C. 1982), the court dismissed a suit which attempted to force a federal employer to process employee grievances.

The *Warren* court recognized that §301 would have been the jurisdictional basis for a private sector action against a union, because the action involves both a duty of fair representation and breach of contract claim but found the absence of an analogue to §301 to be dispositive. This result is consistent with this court's decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983) which held that regardless of whether a fair representation action is brought against the union or the employer, it comprises "two claims (which) are inextricably interdependent...The suit is thus not a straightforward breach of contract suit under §301... but a hybrid §301/fair representation claim." Since a federal employer may not be sued for breach of contract, this critical jurisdictional underpinning of individual employee suits against unions cannot be satisfied in the federal sector. Quite appropriately, the district court dismissed for lack of jurisdiction the claim against the Institute, a federal employer. *Karahalios v. Defense Language Institute*, 534 F.Supp 1202, 1208 (N.D. Cal. 1982). Karahalios did not appeal this dismissal to the Ninth Circuit.

The exception to the preemption doctrine, recognized in *Vaca v. Sipes*, 386 U.S. 171 (1967), for duty of fair representation suits in the private sector, was based on the fact that Congress expressly

authorized suits for breach of the collective bargaining agreement in Section 301 of the Taft Hartley Act. *Accord, Amalgamated Association of Street, Electrical, Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971). By enactment of §301, Congress created an exception to the NLRB's exclusive jurisdiction. 6/ There are no similar statutory exceptions to the FLRA's jurisdiction. The case at bar presents a different preemption issue, as the question is whether the Reform Act preempts federal question jurisdiction, 28 U.S.C.§1331, as a basis for invoking federal court jurisdiction.

The FLRA's unfair labor practice jurisdiction, which includes enforcement of a statutory duty of fair representation provision, preempts that of state and federal courts. In *Tucker v. Defense Mapping Agency*, 607 F. Supp. 1232 (D.R.I. 1985), the court held that a district court may not entertain a duty of fair representation suit because the FLRA's jurisdiction is exclusive. *Id.*, at 1245. *Accord, Clark v. Mark*, 590 F.Supp 1.8 (N.D.N.Y. 1980). In *Yates*, 533 F.Supp. at 465, the court held that "the Act's enforcement scheme provides no avenue for intervention by district courts .... [A]ny general basis for invoking this court's jurisdiction has been preempted by the Act." Congress made a clear decision to vest in one administrative agency nationwide jurisdiction to adjudicate controversies within the Act's purview. *Local 926, International Union of Operating Engineers v. Jones*, 460 U.S. 669 (1983). Despite the Regional Director's approval of the settlement agreement and the General Counsel's refusal to overturn it, Karahalios sought to relitigage his claim in federal court. "The risk of interference with the (FLRA's) jurisdiction is thus obvious and substantial." *Jones*, 460 U.S. at 683. In *Columbia Power Trades Council*, 671 F.2d at 327, the court held, "Given the broad purpose of the Act to meet

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6/ The duty of fair representation was first fashioned in the context of employees covered by the Railway Labor Act. *See Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944). Subsequently, the Supreme Court extended the duty to unions certified under the NLRA. *Ford Motor Co. v. Huffman*, 345 U.S.330 (1953). Extension of the duty to unions certified under the NLRA was not automatic, but had to be determined as appropriate in the context of that statutory scheme.

the *special requirements of government*, the leadership role of the Authority, and the limited role of the judiciary in this statutory scheme, it is manifestly the expressed desire of Congress to create an exclusive statutory scheme." (emphasis added) The court noted the unique nature of the Reform Act, which is "designed to meet the special requirements and needs of the Government." 5 U.S.C. §7101(b).

The alleged conduct is clearly covered by the Reform Act, and does not touch on interests deeply rooted in local feeling or responsibility. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). To the contrary, the CSRA was intended to end the patchwork which had existed and to erect a comprehensive scheme providing for only limited judicial review. In *Carducci v. Regan*, 714 F.2d 171 (D.C. Cir. 1983), the court held that the Reform Act barred district court review of any personnel claims, except those involving constitutional claims. In *Carter v. Kurzejeski*, 706 F.2d 835 (8th Cir. 1983), the court held that neither two individuals nor their union had a cause of action in district court to challenge the removal of the employees in retaliation for their union activity. The court held that the Reform Act created substantive rights and that Congress created detailed procedures for enforcing those rights which are exclusive. Likewise, the exclusive forum for enforcing the statutory right to fair representation is the FLRA.

These holdings are consistent with this court's landmark decision in *Bush v. Lucas*, 462 U.S. 367, 388 (1983), which held that the CSRA remedies were exclusive and that the courts should not create a new *Bivens* damages remedy for an employee whose first amendment rights were violated. The question posed by the court is nearly identical to that presented by the case at bar: "When a federal civil servant is the victim of a . . . demotion or discharge .... what legal remedies are available to him ... The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy ...." *Id.* at 381, 387. In

Bush, the Court declined to create a new remedy. Similarly, in the case at bar, the relief fashioned by the Reform Act is exclusive, as it does not allow a private civil action for damages against a federal sector union. Therefore, the Ninth Circuit appropriately found there is no basis for district court jurisdiction.

II. THERE IS NO NEED TO SUPPLEMENT THE FLRA'S REMEDIAL POWERS

The FLRA's prosecution of the case at bar indicates that creation of a new civil remedy for federal employees is not needed. Petitioner suggests that he has not been made whole for his losses. However, the district court itself recognized that Karahalios was not entitled to back pay, since it could not conclude "with a reasonable degree of assurance that but for the Union's improper treatment plaintiff would have obtained the pay and benefits he claims." *Karahalios v. Defense Language Institute*, 613 F. Supp. 440, 449 (N.D. Cal. 1984). While the petitioner now minimizes the value of the posting ordered by the FLRA, the district court placed great value on the relief obtained through the FLRA administrative process. It recognized the value of this relief in applying a "common benefit rationale" to allow recovery by Karahalios of his attorney's fees incurred before the FLRA and in district court. *Id.*, at 450.

The FLRA's role in the arbitration process is quite distinct from that of the NLRB. The FLRA has review authority over all federal sector arbitration awards, except those involving personnel actions which might have been brought before the Merit Systems Protection Board (MSPB) and which are appealable to the U.S. Court of Appeals for the Federal Circuit. 5 U.S.C. §7121(e). FLRA decisions on exceptions to arbitration awards are not appealable. 5 U.S.C. §7123. The FLRA's role in the substantive interpretation of collective bargaining agreements is distinct from the private sector scheme. In *Vaca v. Sipes*, 386 U.S. 71 (1967), the Court refused to apply pre-emption to end district court jurisdiction over these claims. The Court held that fair representation suits often require review of the substantive positions taken and policies

pursued by a union in its negotiation of a collective bargaining agreement and that since "these matters are not normally within the Board's unfair labor practice jurisdiction, it can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts." *Id.* at 181. In the federal sector, the FLRA must routinely review contracts in the context of review of arbitration awards, so the FLRA has the expertise which the NLRB lacks.7/

Petitioner's suggestion that the FLRA is shielding unions from financial liability is sharply contradicted by the FLRA's policies in regard to breaches of the duty of fair representation. Since its creation, the Authority has exercised jurisdiction over breaches of the duty of fair representation. *See NTEU Chapter 202 and Department of Treasury*, 1 FLRA 909 (1979); *Federal Aviation Science and Technological Association, NAGE*, 2 FLRA 802(1980); *Tidewater Va Federal Employees Metal Trade Council and Douglas Edward Burns*, 8 FLRA 217, 230-232 (1982). The FLRA has been quite willing to take the offensive in this area.

In appropriate cases, the FLRA will award employees back pay against unions which have breached the duty of fair representation. In *International Association of Machinists, Lodge 39 and Roy G. Evans*, 24 FLRA 352 (1986), the FLRA ordered that the union ask the employer for permission to file a late grievance, and that if permission were refused, the union would be obligated to pay the employee the amount of earnings lost during the period of suspension. *See also Federal Employees Metal Trades Council, Portsmouth Naval Shipyard and Robert Fall*, 12 FLRA 276, 282 (1983) (General Counsel sought back pay, at n. 3).

7/ Likewise, other concerns voiced by this Court in *Vaca* to justify an exception to *pre-emption* are inapplicable to the federal sector. In the federal sector, the balance between individual and collective interests favors the individual more than it does in the private sector, and therefore, there is less need for a judicial right of action for breaches of the duty. An employee who is distrustful of his union may file a grievance on his own, although only the union may invoke arbitration. *See* 5 U.S.C. §7121(b)(3)(B), (C). Notwithstanding the existence of a negotiated grievance procedure, an employee may still appeal a removal or major suspension to the MSPB. *See*, 5 U.S.C. §7121(e)(1). Finally, federal sector unions may not negotiate any form of compulsory union membership.

The FLRA has taken an aggressive stance concerning the application of the duty of fair representation. In its decisions, it tried to extend the duty to statutory appeals covered by 5 U.S.C. §7701, but the FLRA was twice reversed by the courts of appeals, which took a narrower view of the duty. In *National Treasury Employees Union v. FLRA*, 800 F.2d 1165 (D.C. Cir. 1986), the court reversed an FLRA decision that the union committed a ULP by failing to provide attorneys for non-union members in statutory appeal proceedings, where it provided union members with attorneys in those proceedings. The court rejected the FLRA's view that §7114(a)(1) stated a duty broader than that implied in the private sector. In *American Federation of Government Employees v. FLRA*, 812 F.2d 1326 (10th Cir. 1987), the 10th Circuit adopted the reasoning of the D.C. Circuit in *NTEU* and held that the doctrine of fair representation did not apply to Merit Systems Protection Board proceedings. Thus, the FLRA tried to broaden the duty of fair representation, although its view was rejected by the courts. 8/

III. THE CONFLICT IN THE CIRCUITS IS MORE APPARENT THAN REAL

As its primary basis for acceptance of the petition for certiorari, petitioner relies upon a claimed conflict in the circuits regarding district court jurisdiction over fair representation cases brought by federal employees. Petitioner asserts that five courts of appeals have considered this issue. One of these, the Fourth Circuit, merely affirmed without an opinion, the district court decision in *Naylor v. American Federation of Government Employees, Local 446*, 580 F. Supp. 137 (W.D.N.C. 1983), *aff'd without opinion* 727 F.2d 1103 (4th Cir. 1984), *cert. denied*, 469 U.S. 850 (1984). The District Court did hold that it had jurisdiction over a fair representation claim brought by a federal employee, although on the merits, which were addressed in the same opinion, it denied the claim. Thus, the Fourth Circuit has not addressed the jurisdictional issue.

8/ The FLRA recently adopted the narrower view of the duty of fair representation. *Ft. Bragg Association of Educators, National Education Association and Fort Bragg Department of Defense Dependants Schools*, 28 FLRA No. 118 (1987).

The Tenth Circuit squarely addressed this issue in *Pham v. American Federation of Government Employees, Local 916*, 799 F.2d 634, 639 (10th Cir. 1986), and did reach a result contrary to that of the Eleventh Circuit in *Warren v. Local 1759, American Federation of Government Employees*, 764 F.2d 1395, 1399, *cert. denied*, 106 S.Ct. 527 (1985), and to that of the Ninth Circuit in the decision below. The Third Circuit has affirmed, in an unreported memorandum decision, a district court holding that it lacked jurisdiction to hear the employee's claims in this situation. *Wilson v. United States Bureau of Prisons*, No. 84-5735 (1985).

A more recent decision of the Tenth Circuit completely undercuts the result reached in *Pham* and suggests that there may not be any conflict in the circuits. In *Pham*, the court minimized the significance of the absence of a §301 parallel in the Reform Act and avoided the pre-emption issue by holding,

> the duty of the union which is the focus of this suit is not the same as the union's statutory mandate not to discriminate on the basis of union membership found in 5 U.S.C. §7114(a)(1). That section does not encompass the same duty that has been described as the duty of fair representation. The duty of fair representation is much broader than a simple prohibition against treating union members differently from other employees in the same bargaining unit. 799 F.2d at 639.

This reasoning was implicitly repudiated in a more recent decision of the Tenth Circuit, *American Federation of Government Employees Local 916 v. FLRA*, 812 F.2d 1326 (1987). There the court approvingly cited the following language from the decision of Judge Bork in *National Treasury Employees Union v. FLRA*, 800 F.2d 1165 (D.C. Cir. 1986).

> The Supreme Court in *Steele* and subsequent cases drew from the first sentence of §9(a) of the NLRA an implication of a duty that is substantially expressed in the second sentence of 5 U.S.C. §7114(a)(1)(1982), the federal sector provision. The logical, and we think .... conclusive, inference is that when Congress came to write section 7114(a)(1) it included a first sentence very like the first sentence of section 9(a) and then

> added a second sentence which summarized the duty the Court had found implicit in the first sentence. In short, *Congress adopted for government employee unions the private sector duty of fair representation* (emphasis added). 800 F.2d at 1171.

The Tenth Circuit holding was identical to that of the D.C. Circuit. By now holding that §7114(a)(1) constitutes a codification of the private sector duty of fair representation, the 10th Circuit has eliminated a crucial underpinning of its decision in *Pham*. The Tenth Circuit should be given an opportunity to resolve this gross inconsistency before this Court agrees to hear a federal sector fair representation case addressing the issue of a private cause of action.

CONCLUSION

For the aforesaid reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 87-636

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

EFTHIMIOS A. KARAHALIOS,

Petitioner,

v.

DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, PRESIDIO OF MONTEREY, and LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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December 4, 1987

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INTRODUCTION

Respondent Local 1263's opposition brief fails to adequately address the issues raised in the petition for certiorari.

I. THE FEDERAL CIRCUIT COURTS ARE COMPLETELY DIVIDED ON THIS ISSUE.

The union suggests that the question of whether the federal employee has a cause of action for breach of the duty of fair representation should not be addressed now because the circuit courts are not truly

divided on this issue. The union's position is simply not borne out by the decisions of the circuit courts.

A federal employee in the Fourth Circuit and the Tenth Circuit can apparently bring a cause of action in federal district court to redress a union's breach of the duty of fair representation. *Naylor v. American Fed'n of Gov't Employees, Local 446*, 580 F.Supp. 137 (W.D.N.C. 1983), *aff'd without opinion*, 727 F.2d 1103 (4th Cir. 1984), *cert. denied*, 469 U.S. 850 (1984); *Pham v. American Fed'n of Gov't Employees, Local 916*, 799 F.2d 634 (10th Cir. 1986). However, if the federal employee happens to be located in the Third Circuit, the Ninth Circuit, or the Eleventh Circuit, the district court will apparently dismiss the same case. *Wilson v. United States Bureau of Prisons*, No. 84- 5735 (3d Cir. 1985); *Karahalios v. Defense Language Inst.*, Nos. 85-1602, 85-1626, 86-2006 (9th Cir. 1987); *Warren v. Local 1759, American Fed'n of Gov't Employees*, 764 F.2d 1395 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 527 (1985).

It is true, as the union points out, that one of the decisions upholding such a cause of action, *Naylor v. American Fed'n of Gov't Employees, Local 446*, 580 F.Supp. 137 (W.D.N.C. 1983), *aff'd without opinion*, 727 F.2d 1103 (4th Cir. 1984), *cert. denied*, 469 U.S. 850 (1984), is a decision without a reported opinion. It is also true that one of the decisions which dismissed the same cause of action, *Wilson v. United States Bureau of Prisons*, No. 84-5735 (3d Cir. 1985), is a decision without a reported opinion.

While the lack of reported opinions by these circuits is hardly dispositive of the issue, the diametrically opposed results in these cases present a good example of the completely confused state of the law in this area, and demonstrate the compelling need for this Court to settle the issue.

The union also asserts that the Tenth Circuit has changed its position in *Pham v. American Fed'n of Gov't Employees, Local 916*, 799 F.2d 634 (10th Cir. 1986), by its subsequent decision in *American Fed'n of Gov't Employees, Local 916 v. FLRA*, 812 F.2d 1326 (10th Cir. 1987). However, the union's assertion is incorrect.

The Tenth Circuit's reasoning in *American Fed'n of Gov't Employees, Local 916 v. FLRA*, 812 F.2d 1326 (10th Cir. 1987) is completely consistent with its opinion in *Pham v. American Fed'n of Gov't Employees, Local 916*, 799 F.2d 634 (10th Cir. 1986).

Both *American Fed'n of Gov't Employees, Local 916 v. FLRA*, 812 F.2d 1326 (10th Cir. 1987), and the case which it cites as authority, *National Treasury Employees Union v. FLRA*, 800 F.2d 1165 (D.C.Cir. 1986), emphasized that the Civil Service Reform Act of 1978, Fed'l Service Labor-Management and Employee Relations Statute, 5 U.S.C. Sections 7101 *et seq.*, "adopted for government employee unions the private sector duty of fair representation". *National Treasury Employees Union v. FLRA*, 800 F.2d 1165, 1171 (D.C.Cir. 1986).

These cases simply stand for the proposition that the federal government union has the same duty of fair

representation as the private sector union. By the same token, the federal government employee should have the same ability to seek redress in the federal district courts when his union breaches that duty as the private sector employee has had since *Vaca v. Sipes*, 386 U.S. 171 (1967). The Tenth Circuit recognized in *Pham* that this case was simply a federal sector version of the *Vaca* problem, and found that there was no Congressional intent to deprive the federal sector employee from his *Vaca* remedy. 799 F.2d at 639. There is no indication of any sort in *American Fed'n of Gov't Employees, Local 916 v. FLRA*, *supra*, 812 F.2d 1326 (10th Cir. 1987), that the Tenth Circuit's opinion on this fundamental issue has changed in any respect whatsoever.

CONCLUSION

As Mr. Justice White noted in *Vaca*:

> "The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation." 386 U.S. at 183.

The federal circuit courts have been unable to reach a consensus on the issue of whether these same policy concerns apply to the federal government employee wronged by his union's actions.

This is a particularly appropriate case to review the issue because here there has been a factual finding by the district court that the union breached its duty of fair representation to petitioner on three different occasions.

There is no reason to wait for further confusion in the federal courts before this issue is squarely decided.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a federal employee who alleges that his exclusive bargaining representative breached its duty of fair representation may bring a private cause of action for damages in a federal district court, or whether his exclusive remedy is to file an unfair labor practice charge with the Federal Labor Relations Authority.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-636

EFTHIMIOS A. KARAHALIOS, PETITIONER

v.

DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, PRESIDIO OF MONTEREY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner, Efthimios Karahalios, is employed by respondent-employer, Defense Language Institute/Foreign Language Center, Presidio of Monterey (DLI), as a Greek language instructor (Pet. App. 3a). In 1976, he applied for promotion to a newly created "course developer" position (*ibid.*). As part of the application process, petitioner took a competitive examination (*ibid.*). Based on his test score and other qualifications, DLI initially selected petitioner to fill the "course developer" position (*ibid.*).

Respondent union, the National Federation of Federal Employees, Local 1263, which represents the bargaining unit of which petitioner is a non-union member, subsequently filed a grievance protesting the selection process that DLI used in selecting petitioner for the "course developer" position (Pet. App. 3a). Specifically, respondent union complained that one of the

other members of the bargaining unit, Simon Kuntelos, had been demoted from such a course developer position when that position was eliminated in an earlier reorganization of DLI and that Kuntelos was entitled to, but had not received, some non-competitive consideration for the new course developer position (*ibid.*). Respondent union did not advise petitioner that it had filed this grievance (*id.* at 6a). Nor did it advise him when it decided to pursue Kuntelos's grievance to arbitration (*ibid.*). Rather, petitioner learned of the union's actions only after an arbitrator, in August 1977, ordered DLI to reconstitute its "course developer" selection process (in accordance with certain guidelines specified in the award) and to reconsider its promotion of petitioner (*id.* at 3a-4a).

As a result of the arbitrator's ruling, DLI allowed Kuntelos to take the competitive examination that petitioner had taken (Pet. App. 4a). In addition, DLI provided Kuntelos with substantially more time to complete the examination than had been afforded to petitioner (*ibid.*). Kuntelos received a score on the examination that was two points higher than petitioner had received (*ibid.*). DLI then demoted petitioner and promoted Kuntelos to the course developer position (*ibid.*).[1]

Petitioner objected to his demotion and filed two grievances with DLI (Pet. App. 4a). DLI denied these grievances (*ibid.*). Petitioner requested that respondent union take his grievances to arbitration, but the union declined to do so; it told petitioner that its earlier arbitral efforts on behalf of Kuntelos precluded it from seeking arbitration on his behalf (*ibid.*).

Petitioner responded by filing unfair labor practice charges with the Federal Labor Relations Authority (FLRA) (Pet. App. 4a). He alleged that DLI had breached the collective bargaining agreement by its actions and that respondent union had breached its duty of fair representation by not seeking arbitration on his behalf (*ibid.*). The FLRA's General Counsel disagreed with petitioner's breach of contract claim, but agreed with the duty of fair representation claim and issued a complaint to this effect against respondent union (*ibid.*). But when respondent-union agreed to post a notice for all bargaining unit employees, stating that in the future it would not inform them that it could not represent more than one employee competing for a position, the regional director of the FLRA, without consulting with petitioner, settled the complaint (*ibid.*).

[1] Kuntelos held the "course developer" position from May 1978 to October 1979, at which time the position was again abolished (Pet. App. 4a).

2. After unsuccessfully appealing the regional director's decision to the FLRA's General Counsel, petitioner filed this suit against DLI and the union in federal district court, alleging that DLI had breached the collective bargaining agreement and that the union had breached its duty of fair representation (Pet. App. 4a-5a). The district court held that Title VII of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. (& Supp. IV) 7101 *et seq.*, imposes on a union of federal employees an "implied duty of fair representation" and that this implied duty is privately enforceable in federal court under 28 U.S.C. 1331 (Pet. App. 5a). The court expressly rejected respondents' argument that the CSRA's unfair labor practice provisions and procedures provide the sole means for enforcing the union's duty of fair representation, reasoning that the unfair labor practice provisions and procedures serve broad public interests and thus may not effectively remedy the injuries that an individual suffers as a result of a union's breach of its duty of fair representation (*ibid.*; 534 F. Supp. 1202, 1207-1208 (N.D. Cal. 1982)). The court also held that it could not assume jurisdiction over petitioner's claim against DLI (Pet. App. 5a-6a; 544 F. Supp. 77, 77-78 (N.D. Cal. 1982)).[2] On the merits, the court ruled that the union had in fact breached its duty of fair representation (Pet. App. 6a; 613 F. Supp. 440, 446-448 (N.D. Cal. 1982)).[3]

3. The Ninth Circuit reversed (Pet. App. 1a-13a). It initially stated (*id.* at 7a-8a) that, under *Vaca* v. *Sipes*, 386 U.S. 171

[2] The court reasoned (Pet. App. 5a-6a) that the action was for an amount greater than $10,000 and that, under the Tucker Act (28 U.S.C. 1346, 1491), such actions must be brought in the Claims Court.

[3] The court found fault (Pet. App. 6a) with respondent-union's failure to consult with petitioner about its decision to arbitrate on behalf of Kuntelos, with its failure to notify petitioner of the Kuntelos arbitration, and with its decision not to seek arbitration of petitioner's claim without considering its merits.

(1967), a private sector employee who is injured by a union's alleged arbitrary refusal to process a grievance can sue his union for breaching its duty of fair representation and his employer, under Section 301 of the Labor-Management Relations Act, 1947 (LMRA), 29 U.S.C. 185, for breaching the collective bargaining agreement. The court then stated (Pet. App. 8a) that, while "[t]here is no statutory provision analogous to Section 301 * * * under the CSRA," "this difference alone would not justify us in concluding that * * * Congress * * * intended to confer upon unions unlimited discretion." But the court found it significant (*id.* at 9a) that, "[w]hen Congress enacted the CSRA[,] the federal courts had implied a duty of fair representation not only under the National Labor Relations Act[,] as in *Vaca,* but also under the Railway Labor Act[,]" in *Steele* v. *Louisville & N.R.R.,* 323 U.S. 192 (1944); that, "[a]ware of these decisions and aware of how important *Steele,* the seminal case, has been in protecting the rights of racial minorities, Congress itself imposed the duty of fair representation on federal unions"; and that, nevertheless, "Congress * * * failed to provide jurisdiction in the federal courts to enforce the duty" (Pet. App. 9a). The court concluded that, while "*[a]rgumentum ex silentio* is normally weak," "[h]ere the silence of Congress appears to be deliberate" (*ibid.*).

In so concluding, the court noted that, in negotiating the final provisions of the CSRA, the Conference Committee rejected a provision that would have authorized federal courts to order parties to collective bargaining agreements to engage in arbitration (Pet. App. 9a-10a). The court recognized that "the provision which the Conference Committee eliminated did not deal with the claim of an employee against his union" (*id.* at 10a). But the court noted that "the enforcement scheme chosen by Congress showed a strong preference for keeping the interpretation and enforcement of collective bargaining agreements within the process of arbitration, to be reviewed in the first instance by the FLRA" (*ibid.*). It further noted that "there is an express provision that 'a labor organization which has been accorded exclusive recognition * * * is responsible for representing the interest of all employees in the unit it represents without discrimination' " (*id.* at 10a-11a (quoting 5 U.S.C. 7114(a)(1)), and that the FLRA has "the power to remedy a breach of this duty by awarding back pay * * *" (Pet. App. 11a). The court concluded that this "fit between the duty and the remedy provided" is determinative of the question presented (*ibid.*).

The court also recognized that "the FLRA has been criticized for not enforcing the duty of fair representation vigorously enough" (Pet. App. 11a). But the court noted that "[i]t is of course open to interpretation whether the small number of complaints actually issued reflects lack of zeal or lack of real problems in this area" (*id.* at 12a). And it added that "[t]he facts of this case * * * indicate that the existence of a district court remedy after investigation and issuance of a complaint by the General Counsel may lead to a tortuous path of litigation whose costs are disproportionate to the individual benefit achieved and whose protracted twists and turnings must be as disheartening to any eventual winner as they are to any eventual loser" (*id.* at 12a-13a). It thus concluded that, "whether the microcosm of this case is studied or whether the general practice of the FLRA is reviewed, no strong reason appears to overturn what seems to be the congressional intent to channel the grievances of federal employees to the [FLRA]" (*id.* at 13a).

DISCUSSION

Petitioner and respondent union appear to agree (Pet. 10-12; Br. in Opp. 4-5; Pet. Reply Br. 3-4) that, in Section 7114(a)(1) of the CSRA, Congress has expressly codified a duty of fair representation for federal-sector unions that is similar if not identical to the duty of fair representation that the courts have found implicit in the exclusive bargaining power granted to private-sector unions by the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, and the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*[4] They also appear to agree (Pet.

[4] Section 7114(a)(1) of the CSRA (5 U.S.C. 7114(a)(1)) provides that:

> A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements

10-12; Br. in Opp. 4-5) that this express duty of fair representation is enforceable by the General Counsel of the FLRA through the unfair labor practice provisions and procedures set forth in Sections 7116(b) and 7118 of the CSRA.[5] They disagree

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covering, all employees in the unit. An exclusive repesentative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

Several courts, as well as the FLRA itself, have held that this provision fully codifies for the federal sector the duty of fair representation that has been established in the private sector by implication under the NLRA and the RLA. See *AFGE* v. *FLRA*, 812 F.2d 1326 (10th Cir. 1987); *National Treasury Employees Union* v. *FLRA*, 800 F.2d 1165 (D.C. Cir. 1986); *Ft. Bragg Ass'n of Educators*, 28 F.L.R.A. No. 118 (Sept. 4, 1987). Like petitioner and respondents, we assume, for purposes of this case, that the provision in fact does so.

[5] Section 7116(b) of the CSRA (5 U.S.C. 7116(b)) provides, in pertinent part, that:

(b) For the purposes of this chapter, it shall be an unfair labor practice for a labor organization–

* * * * *

(8) to otherwise fail or refuse to comply with any provision of this chapter.

* * * * *

Section 7118 of the CSRA (5 U.S.C. 7118) provides, in pertinent part, that:

(a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

* * * * *

(7) If the Authority * * * determines after any hearing on a complaint * * * that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of

only with respect to the question whether the CSRA's express duty of fair representation is also enforceable by a federal employee in a federal court action for money damages and other relief.[6] The proper resolution of this question has divided the courts of appeals, and the question is of concern to thousands of federal employees and the collective bargaining agents that represent them. Accordingly, we believe that this Court's review is warranted. We also believe that the court of appeals reached the correct result on the merits.

1. As the court below noted (Pet. App. 7a), there is a square conflict among the courts of appeals on the question presented. The Tenth Circuit has held that a federal employee alleging that his exclusive bargaining representative has breached its duty of fair representation may bring a private action in federal court to

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fact and shall issue and cause to be served on the agency or labor organization an order–

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of an employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

* * * * *

[6] Whether a violation of the duty of fair representation is an unfair labor practice is a question presumably within the exclusive jurisdiction of the FLRA. Cf. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959). But the question remains whether Congress intended to create an " 'independent federal remedy' " for a violation of the duty of fair representation. See *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, No. 85-2079 (Feb. 23, 1988), slip op. 3 n.4; *Kaiser Steel Corp* v. *Mullins*, 455 U.S. 72, 83 (1982); *Connell Constr. Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 626 (1975).

enforce the duty. See *Pham* v *AFGE, Local 916*, 799 F.2d 634 (1986).[7] It appears that the Fourth Circuit has done so as well. See *Naylor* v. *AFGE Local 446*, 580 F. Supp. 137 (W.D.N.C. 1983), aff'd without opinion, 727 F.2d 1103 (4th Cir. 1984) (Table)), cert. denied, 469 U.S. 850 (1984). By contrast, the Eleventh Circuit (like the Ninth Circuit is this case) has held that an alleged breach of the duty of fair representation may be prosecuted only by the General Counsel of the FLRA, under the unfair labor practice provisions and procedures set forth in Sections 7116 and 7118 of the CSRA. See *Warren* v. *Local 1759, AFGE*, 764 F.2d 1395 (11th Cir.), cert. denied, 474 U.S. 1006 (1985). The Third Circuit appears to have so held as well. See *Wilson* v. *United States Bureau of Prisons*, 770 F.2d 1078 (1985) (Table), aff'g 585 F. Supp. 202 (M.D. Pa. 1984). This conflict among the circuits is an important one, because thousands of federal employees are represented by exclusive bargaining agents, which engage in a wide variety of activities that could give rise to claims for breach of the duty of fair representation. The Court should use this case to resolve the conflict.

2. On the merits, we believe that the decision below is correct. Although the evidence as to congressional intent is not clear cut, it appears, on balance, that Congress intended that the duty of fair representation applicable to federal-sector unions would be enforced exclusively by the General Counsel of the FLRA, under the unfair labor practice provisions and procedures set forth in Sections 7116 and 7118 of the CSRA.

a. Although the CSRA codifies a duty of fair representation (5 U.S.C. 7114(a)(1)), it does not expressly make that duty (or any other statutory duty) directly enforceable by a federal

[7] Contrary to respondent union's suggestion (Br. in Opp. 12), the Tenth Circuit's subsequent decision in *AFGE, Local 916* v. *FLRA*, 812 F.2d 1326 (1987), does not alter the *Pham* court's holding that a union's duty of fair representation may be privately enforced. It addresses only the scope of a union's duty of fair representation and the basis for deriving that duty in the CSRA; it does not decide whether that duty is enforceable outside of the unfair labor practice provisions and procedures set forth in the CSRA. See *id.* at 1327-1328.

employee in a federal or state court action. Indeed, the CSRA expressly empowers courts to act in only three instances: where a person is aggrieved by a final order of the FLRA (5 U.S.C. 7123(a)); where the FLRA petitions an appropriate court of appeals for enforcement of one of its orders or for appropriate temporary relief or restraining order (5 U.S.C. 7123(b)); and where, upon issuing an unfair labor practice complaint, the FLRA petitions a federal district court for temporary injunctive relief (5 U.S.C. 7123(d)). Thus, the duty of fair representation may be directly enforced by a federal employee in a federal or state court action only if a private cause of action for enforcement of the duty can be found by implication in the CSRA.[8]

b. In determining whether a private cause of action is implied by a federal statute, the Court has said that the "focal point" for analysis "is Congress' intent in enacting the statute." *Thompson* v. *Thompson*, No. 86-964 (Jan. 12, 1988), slip op. 4. "Factors relevant to this inquiry are the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 91 (1981)). See also *Thompson* v. *Thompson*, slip op. 4-5; *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 535-536 (1984); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981). Viewed in these terms, we do not believe that a private cause of action for breach of the duty of fair representation can be found in the CSRA.

(1) The language of the statute contains not even a hint that Congress intended to give federal employees the right to enforce the duty of fair representation in federal or state court actions. Section 7114(a)(1) of the CSRA provides only that "[a]n exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization

[8] If such a cause of action can be found by implication in the CSRA, then 28 U.S.C. 1331 and 1337 would provide federal court jurisdictional.

membership." This statutory language does not "explicitly confer[] a right directly on" individual federal employees. *Cannon* v. *University of Chicago*, 441 U.S. 677, 690 n.13 (1979). Rather, it contains only "a ban on discriminatory conduct" by exclusive bargaining agents (*id.* at 691-693). To be sure, this ban confers a benefit on the federal employees whom the exclusive bargaining agents represent. But "[t]he question is not simply who * * * benefit[s] from the Act." *California* v. *Sierra Club*, 451 U.S. 287, 294 (1981). The question is whether Congress intended that the federally conferred benefit "would be enforced through private litigation." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18 (1979). And the Court has consistently held that statutory language of this type, which merely confers a statutory benefit on a particular class of persons, does not give rise to an inference that Congress intended to create a private cause of action for enforcement of the statutory benefit by those persons. See, *e.g.*, *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 145 (1985) (statute imposing liability for breach of fiduciary duties does not confer upon beneficiaries of benefit plans a private cause of action for non-contractual money damages); *Universities Research Ass'n* v. *Coutu*, 450 U.S. 754, 771-784 (1981) (statutory requirement that certain federal construction contracts contain a stipulation that laborers and mechanics will be paid "prevailing wages" does not confer upon employees a private cause of action for back wages); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 17-22 (statute proscribing certain fraudulent practices by investment advisors does not confer upon clients of investment advisors a private cause of action for money damages).

(2) "The structure of the statute[] similarly counsels against recognition of the implied right petitioner advocates in this case" (*Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. at 93). The CSRA carefully specifies how and by whom the duty of fair representation is to be enforced. It provides that it is "an unfair labor practice for a labor organization * * * to * * * fail or refuse to comply with any provision of this chapter" (5 U.S.C. 7116(b)(8)), which plainly encompasses the codified duty of fair representation found in Section 7114(a)(1)

of the statute. It further provides that any such unfair labor practice shall be remedied through the procedures outlined in Section 7118 of the statute, which authorize the General Counsel of the FLRA to investigate unfair labor practice charges, to issue complaints with respect to alleged unfair labor practices, and to seek backpay and other remedial orders from the FLRA for aggrieved federal employees. Finally, it provides that private persons may obtain judicial review only with respect to final orders of the FLRA (5 U.S.C. 7123(a)); that, in such appeals, the FLRA's findings of fact are to be conclusive if supported by substantial evidence (5 U.S.C. 7123(c)); and that "[n]o objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances" (5 U.S.C. 7123(c)). Where other statutes have contained such comprehensive and integrated enforcement schemes, the Court has said private causes of action should not be found by implication. See, *e.g.*, *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. at 146-147 & n.15; *Transamerica Mortage Advisors, Inc.* v. *Lewis*, 444 U.S. at 18-19; *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 571-574 (1979); *National R.R. Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974). Rather, "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement" (*Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. at 97).

(3) The legislative history of the CSRA, while not speaking directly to the question, further suggests that Congress intended that the duty of fair representation would be enforced exclusively by the General Counsel of the FLRA, under the unfair labor practice provisions and procedures established in Sections 7116 and 7118 of the CSRA. In discussing the availability of judicial review for actions arising under the CSRA, the House Report states both that "the General Counsel of the Authority makes the final decision as to the issuance of a complaint of an unfair labor practice" and that "[o]nly those labor-management rela-

tions matters specifically referred to in section 7123 shall be judicially reviewable." H.R. Rep. 95-1403, 95th Cong., 2d Sess. 58 (1978). The Senate Report states that "[a]ll complaints of unfair labor practices * * * that cannot be resolved by the parties shall be filed with the FLRA." S. Rep. 95-969, 95th Cong., 2d Sess. 107 (1978). Finally, as the court below noted (Pet. App. 9a-10a), the Conference Committee rejected a provision that would have authorized federal courts to order parties to collective bargaining agreements to engage in arbitration, so that "[a]ll questions of this matter w[ould] be considered at least in the first instance by the [FLRA]." H.R. Rep. 95-1717, 95th Cong., 2d Sess. 157 (1978). This legislative history is difficult to reconcile with the recognition of a private cause of action for enforcement of the duty of fair representation, in which a federal employee presumably could completely bypass both the unfair labor practice provisions and procedures and the expert administrative agency that administers them. It is therefore "one more piece of evidence that Congress did not intend to authorize a cause of action" (*Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 22).[9]

(4) When Congress enacted the CSRA and its express duty of fair representation, this Court had previously recognized implied causes of action under both the NLRA and the RLA for enforcement of the duty of fair representation applicable to private-sector unions. See *Vaca* v. *Sipes*, 386 U.S. 171 (1967) (NLRA); *Steele* v. *Louisville & N.R.R.*, 323 U.S. at 192 (RLA).

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[9] In *United States* v. *Fausto*, No. 86-595 (Jan. 25, 1988), the Court held that a non-veteran, excepted service federal employee could not challenge a 30-day suspension in the Claims Court, even though a pre-CSRA remedy existed and the CSRA provides *no* alternative administrative or judicial remedy. In reaching that conclusion, the Court noted that "[a] leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action," and particularly emphasized the dissatisfaction reflected in the legislative history with the " 'wide variations in the kinds of decisions * * * issued on the same or similar matters,' " "which were the product of concurrent jurisdiction, under various bases of jurisdiction, of the district courts in all Circuits and the Court of Claims" (slip op. 4, 5 (citation omitted)).

This Court has said that, "[w]hen Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts," the relevant "question is whether Congress intended to preserve the pre-existing remedy." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 378-379 (1982)). See also *Cannon* v. *University of Chicago*, 441 U.S. at 696-699. But, here, there is no pre-existing remedy, only the analogy to one, and substantial reason to believe that Congress did not intend to extend such a cause of action to the federal sector.

First of all, the Congress that enacted the CSRA may not have viewed the NLRA and RLA, with their implied judicial remedies, as the relevant benchmarks. While Section 7114(a))1) of the CSRA creates an express duty of fair representation that is similar if not identical to the implied duty of fair representation under the NLRA and the RLA, its language is taken almost verbatim from Executive Order No. 10,988, which, as amended by subsequent executive orders (see Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Order Nos. 11,616, 11,636, and 11,838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.)), regulated labor-management relations in the federal sector before the CSRA. See Brower, *The Duty of Fair Representation Under the Civil Service Reform Act: Judicial Power to Protect Employee Rights*, 40 Okla. L. Rev. 361, 369-371 (1987); see generally *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 91-93 (1983). When the CSRA was enacted, the courts had almost uniformly held that the provisions of the Executive Order were not judicially enforceable (because the Executive Order was not "a law of the United States" within the meaning of 28 U.S.C. 1331). See, *e.g.*, *Stevens* v. *Carey*, 483 F.2d 188, 190 (7th Cir. 1973); *Local 1498, AFGE* v. *AFGE*, 522 F.2d 486, 491 (3d Cir. 1975); *Kuhn* v. *National Ass'n of Letter Carriers*, 570 F.2d 757, 760-761 (8th Cir. 1978). See generally *United States* v. *Professional Air Traffic Controllers*, 653 F.2d 1134, 1137 (7th Cir. 1981), cert. denied, 454 U.S. 1083 (1981).

Second, whatever Congress's understanding about the "contemporary legal context" in which it enacted Section 7114(a)(1) (cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran,* 456 U.S. at 381), the language, structure, and legislative history of the CSRA, as discussed above, suggest that Congress may have made a considered judgment *not* to create an analogue to the private cause of action for the enforcement of the duty of fair representation recognized by the courts in NLRA and RLA cases. Neither the NLRA nor the RLA as originally enacted contained any administrative mechanism for enforcing a duty of fair representation against unions. The absence of any such administrative remedy was a principal reason this Court offered for finding private rights of action implied by those statutory schemes. See *Vaca* v. *Sipes,* 386 U.S. at 180-183; *Steele* v. *Louisville & N.R.R.,* 323 U.S. at 205-207. See generally *Cannon* v. *University of Chicago,* 441 U.S. at 733-734 (Powell, J., dissenting). In the CSRA, however, Congress expressly established such an administrative mechanism for enforcing the duty of fair representation. The fact that Congress expressly made the violation of the duty of fair representation an unfair labor practice, without also expressly providing for a judicial cause of action, suggests that it considered private litigation to be an inappropriate means of enforcing the duty. See *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. at 20-21; cf. *Bush* v. *Lucas,* 462 U.S. 367, 388-390 (1983) (no judicial damage remedy for a wrong that can be remedied through the comprehensive scheme established by the CSRA).

In *Vaca* v. *Sipes, supra,* this Court held that, when Congress amended the NLRA to add an unfair labor practice provision that the National Labor Relations Board (NLRB) later interpreted to address duty of fair representation issues, Congress did not implicitly repeal the private cause of action that the courts had previously recognized under that statute. The Court gave three reasons: (a) "[a] primary justification for the preemption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative

agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation" (386 U.S. at 180-181); (b) "the unique interests served by the duty of fair representation doctrine" in the NLRA context would be frustrated by a refusal to recognize a private right of action under that statute (*id.* at 181-183); and (c) "intensely practical considerations * * * emerg[ing] from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining [agreements]" favor recognition of a judicial cause of action for enforcement of the duty of fair representation (*id.* at 183-188). But each of these reasons is largely or wholly inapplicable in the CSRA context, which further suggests that Congress did not intend that the CSRA's duty of fair representation would be enforced through private litigation.

In the CSRA context, the principal justification for making the administrative remedy exclusive—*i.e.,* avoidance of conflicting rules and reliance on administrative expertise—applies with full force to the duty of fair representation. In contrast to the situation under the NLRA, where the courts began developing the doctrine that became the duty of fair representation well before the NLRB had a basis for assuming jurisdiction over such cases, the CSRA specifically directs the FLRA to define and enforce the duty of fair representation applicable to federal-sector unions, and the FLRA has been active from the statute's inception in doing so. See, *e.g., National Treasury Employees Union,* 10 F.L.R.A. 519 (1982), aff'd, 721 F.2d 1402 (D.C. Cir. 1983); *National Federation of Federal Employees,* 24 F.L.R.A. No. 37 (Dec. 5, 1986), petition for review dismissed *sub nom. Thompson* v. *FLRA,* 830 F.2d 1130 (11th Cir. 1987) (Table). The entry of the courts into this field of decisionmaking can only produce confusion and inconsistency. Moreover, there can be no doubt that the FLRA brings substantial pertinent expertise to this task. Section 7117 of the CSRA (5 U.S.C. 7117) charges the FLRA (and not the courts) with the responsibility for making "negotiability" determinations; these responsibilities provide the FLRA with considerable insight into how a union

formulates bargaining proposals and the reasons why a union engages in particular give-and-take at the bargaining table. In addition, whereas in the private sector courts review arbitration awards in actions brought under Section 301 of the LMRA, Section 7122 of the CSRA (5 U.S.C. & Supp. IV 7122)) charges the FLRA (and not the courts), with exceptions not relevant here, with the responsibility for reviewing arbitration awards; through this process, the FLRA has gained experience with union grievance and arbitration practices—experience that the courts cannot hope to duplicate.

Furthermore, in the CSRA context, refusing to supplement the unfair labor practice provisions with a private cause of action will not frustrate substantial "unique interests" that the duty of fair representation doctrine serves. In the private sector, the statutory grant of exclusive bargaining power to unions deprives individuals of their pre-existing right to make and enforce contracts with their employers. The duty of fair representation thus stands "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law" (*Vaca* v. *Sipes,* 386 U.S. at 182). In the federal sector, by contrast, employment is a result of appointment, not of contract (see *Army & Air Force Exchange Service* v. *Sheehan,* 456 U.S. 728, 735-741 (1982)), and the statutory grant of exclusive bargaining power does not strip a federal employee of substantial pre-existing rights. The employee has no right to make or enforce an individual contract of employment with his agency-employer, and the exercise of exclusive bargaining powers by the union does not deprive the appointed individual of any statutory or constitutional protections. In particular, the CSRA did not deprive petitioner of any rights he would otherwise have had or have been contractually able to obtain against his employer with respect to the promotion at issue. See *United States* v. *Testan,* 424 U.S. 392 (1976); *Arnett* v. *Kennedy,* 416 U.S. 134 (1974). Accordingly, while the duty of fair representation still stands as a desirable bulwark against arbitrary and capricious union action in the federal sector, a private right of action is clearly not necessary to ensure that its unique purposes are served; on the contrary, the duty of

fair representation can be enforced in the same manner as any other limitation on the power of federal-sector unions—by the General Counsel of the FLRA, using his discretionary authority under the unfair labor practice provisions and procedures of the CSRA. Cf. *Vaca* v. *Sipes,* 386 U.S. at 182-183 (unreviewable discretion of NLRB General Counsel significant *because* employees deprived of pre-existing forms of redress by enactment of federal labor laws).[10]

Finally, in the federal-sector, there are no "intensely practical considerations" emerging from the relationship between the duty of fair representation and the enforcement of collective bargaining agreements that favor recognition of a private cause of action for enforcement of the duty of fair representation. Those practical considerations arise in the private sector because collective bargaining agreements are enforceable in court under Section 301 of the LMRA; recognizing an independent cause of action for enforcement of the duty of fair representation allows the courts to consolidate such claims with breach of contract actions and to fashion comprehensive and appropriate remedies. See *Vaca* v. *Sipes,* 386 U.S. at 187-188; see also *Bowen* v. *United States Postal Service,* 459 U.S. 212 (1983) (damages to be apportioned between employer and union) The CSRA does not, however, contain an equivalent to Section 301 of the LMRA, and, as noted (page 4, *supra)* the Conference Committee in

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[10] As the court below recognized (Pet. App. 11a-12a), there is no basis for suggesting that the General Counsel of the FLRA has failed to enforce the duty of fair representation. See also *Warren* v. *Local 759, AFGE,* 764 F.2d at 1399 n.6 ("unpersuaded by Appellant's argument that the FLRA lacks zeal in prosecution of duty of fair representation claims"). Indeed, we are advised by the FLRA General Counsel's Office that, from 1984 to the present, the percentage of complaints issued against unions in cases charging violations of the duty of fair representation has been approximately the same as the percentage of complaints issued against unions arising out of all charges filed for any reason. In all events, as we noted in the text, Congress appears to have intended in the CSRA that federal employees would be subject to the General Counsel's unreviewable discretion on duty of fair representation charges (and all other unfair labor practice charges). Cf. *Touche Ross & Co.* v. *Redington,* 442 U.S. at 568 (1979) (citation omitted) (" 'the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.' ").

fact rejected a provision that would have allowed courts to entertain some such suits, precisely because the Committee believed that "[a]ll questions of this matter [should] be considered at least in the first instance by the Authority" (H.R. Rep. 95-1717, *supra,* at 157). Accordingly, the practical benefits associated with the recognition of a private right of action to enforce the duty of fair representation cannot be achieved in the federal sector.[11]

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[11] The comprehensiveness of the CSRA, combined with the absence of an express provision authorizing suits for breach of the collective bargaining agreement, precludes a suit for this purpose against the agency-employer. Cf. *United States* v. *Fausto, supra,*. Moreover, at least two courts have held that the Tucker Act (28 U.S.C. 1346(a)(2), 1491) does not provide a basis for an action against an agency-employer for violating its collective bargaining agreement. See *Serrano Medina* v. *United States,* 709 F.2d 104 (1st Cir. 1983); *Yates* v. *Soldiers' & Airmen's Home,* 533 F. Supp. 461, 465 n.8 (D.D.C. 1982); see also *Leath* v. *Stetson,* 686 F.2d 769 (9th Cir. 1982). Even if the Tucker Act provided such a basis, however, any claim for more than $10,000 would lie only in the Claims Court, which plainly could not provide a remedy for a breach of the duty of fair representation. See *Karahalios* v. *Defense Language Institute,* 544 F. Supp. at 78 n.1. Thus, proceedings would be bifurcated in many cases, even if the employer-agency could be sued in court on the contract.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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(4)

No. 87-636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EFTHIMIOS A. KARAHALIOS,

Petitioner,

v.

DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, PRESIDIO OF MONTEREY, and LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed October 5, 1987
Certiorari Granted June 6, 1988

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TABLE OF CONTENTS

The following opinions, decisions, judgments and orders have been omitted in printing this joint appendix because they appear in the appendix to the printed Petition for Certiorari:

Opinion of the United States Court of Appeals for the Ninth Circuit, dated July 13, 1987

RELEVANT DOCKET ENTRIES

Date	*Relevant Entry*
6-29-1981	Complaint for damages filed with District Court (Northern District of California)
9-17-1981	Defendant Defense Language Institute's motion to dismiss filed with District Court
10-15-1981	First amended complaint for damages filed with District Court
11-5-1981	Defendant Local 1263's motion to dismiss filed with District Court
1-8-1982	Defendant Defense Language Institute's memorandum in support of motion to dismiss filed with District Court
3-9-1982	Order of District Court denying defendant Local 1263's motion to dismiss for lack of subject matter jurisdiction, and granting defendant Defense Language Institute's motion to dismiss, with leave to amend, entered
7-23-1982	Order of District Court denying defendant's motion for reconsideration entered
12-20-1982	Defendant Defense Language Institute's motion for summary judgment filed with District Court
3-9-1983	Defendant Defense Language Institute's reply brief to plaintiff's opposition to defendants' motions for summary judgment filed with District Court

Date	*Relevant Entry*
8-30-1983	Order of District Court granting defendant Defense Language Institute's motion for summary judgment and denying defendant Local 1263's motion for summary judgment
12-31-1984	Findings of fact and conclusions of law entered in the District Court
12-31-1984	District Court judgment entered
1-28-1985	Notice of appeal from judgment by defendant Local 1263 filed in Ninth Circuit Court of Appeals
2-4-1985	Notice of appeal from judgment denying plaintiff back pay and from the final judgment dismissing defendant Defense Language Institute, filed by plaintiff in Ninth Circuit Court of Appeals
4-5-1985	Order from Ninth Circuit Court of Appeals consolidating appeals entered
5-13-1985	Order from Ninth Circuit Court of Appeals entered staying appeal until District Court's decision on attorneys' fees
6-28-1985	Order from Ninth Circuit Court of Appeals continuing stay of appeal entered
4-1-1986	Order re attorneys' fees entered in District Court
4-28-1986	Notice of appeal from order re attorneys' fees entered

Date	*Relevant Entry*
4-28-1986	Order from Ninth Circuit Court of Appeals consolidating all appeals from District Court
6-30-1986	Brief of appellant Local 1263 filed in Ninth Circuit Court of Appeals
8-25-1986	Brief of appellee and cross-appellant Karahalios filed in Ninth Circuit Court of Appeals
7-1-1986	Brief of *Amicus Curiae*, American Federation of Government Employees, filed in Ninth Circuit Court of Appeals
10-6-1986	Reply brief of appellant Local 1263 filed in Ninth Circuit Court of Appeals
4-16-1987	Oral argument in Ninth Circuit Court of Appeals
7-13-1987	Opinion of Ninth Circuit Court of Appeals filed
7-13-1987	Order of Ninth Circuit Court of Appeals reversing District Court and dismissing case entered

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EFTHIMIOS A. KARAHALIOS Plaintiff, vs. DEFENSE LANGUAGE INSTITUTE-FOREIGN LANGUAGE CENTER PRESIDIO OF MONTEREY, and LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES, Defendant.	No. C 81 2745 RFP (Labor Relations) FIRST AMENDED COMPLAINT FOR DAMAGES

Plaintiff, Efthimios A. Karahalios, alleges:

JURISDICTION

1. This court has jurisdiction pursuant to 28 USC § 1331.

PARTIES

2. Defendant Defense Language Institute-Foreign Language Center Presidio of Monterey (hereinafter referred to as defendant ("DLI") is an agency of the United States Department of Defense which provides instruction in foreign languages to United States military and civil-

ian personnel. Defendant DLI is an "agency" within the meaning of 5 USC § 7103(a)(3).

3. Defendant Local 1263, National Federation of Federal Employees, (hereinafter referred to as defendant ("Union") is a "labor organization" within the meaning of 5 USC § 7103(a)(3) and is the "exclusive representative", within the meaning of 5 USC § 7103(a)(16), of the professional employees of defendant DLI, including plaintiff herein.

3.[*sic*] Plaintiff is employed by defendant DLI as an instructor in the Greek language, which position is classified as GS-1712-9. This action arises out of plaintiff's demotion by defendant DLI from the position of course developer, classified as GS-1712-11.

COLLECTIVE BARGAINING AGREEMENTS

4. The defendants are parties to collective bargaining agreements dated May 5, 1976 and May 15, 1978 respectively. Said agreements govern the conditions of employment, during the time periods material to this action, for all employees of defendant DLI who are represented by defendant Union, including the plaintiff herein. Among other things, each agreement contains detailed provisions governing employee discipline, grievance procedures and arbitration. Those portions of the agreement of May 5, 1976 entitled "Discipline", "Grievances" and "Arbitration" (Articles XVI, XVII and XVIII respectively) are set forth as "Exhibit 1" in support of this complaint. Those portions of the agreement of May 15, 1978 entitled "Grievances", "Arbitration" and "Discipline", (Articles VI, VII and XXII respectively) are set forth as "Exhibit 2" to this complaint.

PLAINTIFF'S GRIEVANCE

5. Prior to the events herein complained of, plaintiff was promoted from instructor (pay grade GS-9) to course developer (pay grade GS-11). Plaintiff's qualifications as course developer and his performance as course developer are not, and have never been, in issue.

6. Shortly after plaintiff became course developer, another DLI instructor, Simon Kuntelos, not a party to this action, filed a grievance, claiming that Kuntelos was improperly not considered for the position of course developer.

7. Mr. Kuntelos was, at all times herein mentioned, a member of defendant Union, and sat on the Board of Directors of defendant Union.

8. Plaintiff is not, and never has been, a member of defendant Union.

9. The relief requested by Mr. Kuntelos was denied in all stages of the grievance procedure. Thereafter defendant Union demanded arbitration on behalf of Mr. Kuntelos.

10. Arbitration proceedings were had before Alvin L. Goldman, Arbitrator, on June 22, 1977, in the *Matter of the Arbitration Between Defense Language Institute and the National Federation of Federal Employees, Local 1263* (FMCS No. 77K14006, Kuntelos Grievance). An award was rendered on August 4, 1977, directing that "the vacancy for the course developer position at issue be declared reopened and the procedure for filling that position be reconstituted." A copy of the arbitration award is set forth as "Exhibit 3" in support of this complaint.

11. At all stages of the Kuntelos grievance, Mr. Kuntelos was represented by defendant Union. In the Kuntelos arbitration, defendant Union was itself a party. Plaintiff was not a party to the Kuntelos arbitration proceedings, was not notified of the pendency of the proceedings, and had no opportunity to appear and be heard therein. Throughout the Kuntelos proceedings, defendant Union actively advocated a position adverse to the interests of plaintiff.

12. On February 21, 1978, defendant DLI first notified plaintiff of the arbitration award, advising plaintiff that the award might result in a demotion.

13. On April 6, 1978, defendant DLI notified plaintiff in writing of a proposed demotion to instructor (pay grade GS-9). On May 5, 1978, defendant DLI gave plaintiff a written decision of the Commandant demoting petitioner, effective May 7, 1978. Copies of the April 6, 1978 Proposed Change to Lower Grade and May 5, 1978 Decision on Change to Lower Grade are set forth as "Exhibits 4 and 5" in support of this complaint.

14. Ever since May 7, 1978, plaintiff has been an instructor (pay grade GS-9). The demotion represents a substantial loss to plaintiff in salary and retirement benefits, as hereinafter alleged.

15. Mr. Kuntelos was given the position of course developer.

16. On May 11, 1978, plaintiff filed a formal grievance in accordance with the grievance procedures as provided in the then effective collective bargaining agreement, seeking permanent reinstatement to the position of course developer (pay grade GS-11), alleging that the

demotion was improper and also alleging certain procedural irregularities in connection with the April 6, 1978 Notice of Proposed Adverse Action. A copy of the grievance of May 11, 1978 and supporting documents is set forth as "Exhibit 6" in support of this complaint.

17. On October 12, 1978, plaintiff filed a second formal grievance, again seeking permanent reinstatement to the position of course developer, alleging that the demotion was without just cause and further alleging procedural irregularities in connection with the selection of Mr. Kuntelos to fill the course developer position—in particular, that different standards were used for testing Mr. Kuntelos than plaintiff. A copy of the grievance of October 12, 1978 and supporting documents is set forth as "Exhibit 7" in support of this complaint.

18. Both grievances of plaintiff were treated by all parties as a single grievance, to be heard and determined by the Commandant in accordance with the grievance procedures of the collective bargaining agreement. On December 20, 1978, the Commandant formally denied petitioner's grievances. A copy of the Commandant's Decision of December 20, 1978 is set forth as "Exhibit 8" in support of this complaint.

19. Thereafter, plaintiff requested defendant Union to invoke arbitration in accordance with the arbitration procedures of the collective bargaining agreement. On January 9, 1979, defendant Union notified plaintiff that defendant Union would not invoke arbitration on his behalf, on the grounds of the Union's conflict of interest. The letter from defendant Union of January 9, 1979 to plaintiff is set forth as "Exhibit 9" in support of this complaint. That letter provides in part:

> "If a grievance is carried further seeking to obtain the position which you seek, it will conflict with the Arbitrator Goldman's original award since the current holder of this position was represented by the Union, and therefore, obtained the position through the same legality which you want to seek. In other words, in a situation where there are two persons seeking one existing position, the Union cannot represent both. Prior to the filing of your grievance, the Union actively represented the present incumbent."

20. On January 17, 1979, plaintiff demanded arbitration against both defendant DLI and defendant Union. A copy of the demand for arbitration dated January 17, 1979 is set forth as "Exhibit 10" in support of this complaint. Both defendants refused to arbitrate the grievance.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

21. On May 16, 1979, plaintiff filed formal unfair labor practices charges against both defendant DLI and defendant Union. The charges were filed with the Federal Labor Relations Authority pursuant to 5 USC § 7118. A copy of the Federal Labor Relations Authority Charge Against Agency (Case No. 9-CA-53) and of the Federal Labor Relations Authority Charge Against Labor Organization Or Its Agents (Case No. 9-CO-5) are set forth as "Exhibits 11 and 12" in support of this complaint.

22. The Regional Director, Region 9, Federal Labor Relations Authority determined not to file unfair labor practices complaints against either defendant DLI or defendant Union. The Regional Director's "dismissal letter" of January 10, 1980 is set forth as "Exhibit 13" in support of this complaint.

23. On January 24, 1980, plaintiff filed a Request for Review of the Regional Director's adverse decision in the office of the General Counsel, Federal Labor Relations Authority. A copy of the Request for Review is set forth as "Exhibit 14" in support of this complaint, and a copy of plaintiff's Supplement to Request for Review dated February 5, 1980 is set forth as "Exhibit 15" in support of this complaint.

24. On June 17, 1980, the office of the General Counsel decided to affirm the Regional Director's decision with respect to the unfair labor practices charge against defendant DLI, but to reverse the Regional Director's decision with respect to the unfair labor practices charge against defendant Union, remanding the matter to the Regional Director "to issue a complaint in this matter, absent settlement". A copy of the General Counsel's decision of June 17, 1980 is set forth as "Exhibit 16" in support of this complaint.

25. Following the remand from the office of the General Counsel, the Regional Director entered into a settlement agreement with defendant Union providing only for the posting of a notice by defendant Union to the effect that defendant Union would not in the future ". . . inform employees that where two or more employees are seeking one position, the Union . . . cannot represent all such employees in the contractual grievance procedure". The settlement agreement did not provide any relief for plaintiff nor did it provide for a hearing on the merits of petitioner's grievance either by arbitration or otherwise. Copies of the settlement agreement and notice are together set forth as "Exhibit 17" in support of this complaint.

26. Following the Regional Director's settlement with defendant Union, plaintiff filed a second Request for Review with the office of the General Counsel, Federal Labor Relations Authority, on August 27, 1980, objecting to the proposed settlement and seeking an order requiring an arbitration of plaintiff's grievance. At the same time, plaintiff requested reconsideration of the General Counsel's adverse decision affirming the Regional Director's actions with respect to the charge against defendant DLI. A copy of plaintiff's Request for Review and Request for Reconsideration dated August 27, 1980 is set forth as "Exhibit 18" in support of this complaint.

27. On November 24, 1980, the General Counsel denied reconsideration in case number 9-CA-53, the charge against defendant DLI. A copy of the General Counsel's decision is set forth as "Exhibit 19" in support of this complaint.

28. On November 26, 1980, the General Counsel denied review in case number 9-CO-5, the charge against defendant Union.

29. Plaintiff has exhausted his administrative remedies.

FIRST CAUSE OF ACTION

30. By refusing to arbitrate plaintiff's grievance, defendant Union breached its duty of fair representation to plaintiff.

SECOND CAUSE OF ACTION

31. By refusing to arbitrate plaintiff's grievance, defendant DLI breached the collective bargaining agreements alleged in paragraph 4 of this complaint.

THIRD CAUSE OF ACTION

32. By defendant DLI's proceeding to arbitrate regarding plaintiff's job without notice to plaintiff, or providing plaintiff an opportunity to be heard, plaintiff was unconstitutionally deprived of property without due process of law as provided by the Fifth Amendment and the Fourteenth Amendment of the United States Constitution.

FOURTH CAUSE OF ACTION

33. The collective bargaining agreement as applied by defendant DLI violates the equal protection clause of the Fourteenth Amendment of the United States Constitution in that it denies the ability to proceed to arbitration to those employees who cannot be represented at the arbitration by their collective bargaining representative, and, as applied, effectively denies collective bargaining representation to such employees.

34. At the time of plaintiff's demotion as herein alleged plaintiff's annual salary was $18,763.00, the salary for pay grade GS-9, step 10.

35. There are ten "steps" within each of pay grades GS-9 and GS-11. Immediately following plaintiff's demotion, plaintiff was already in the highest "step" within pay grade GS-9, and had no possibility of future step increases. Immediately prior to plaintiff's demotion, plaintiff was at step 4 within pay grade GS-11, and, but for the demotion, plaintiff would have been entitled to step increases in salary within pay grade GS-11.

36. Since plaintiff's demotion, there have been cost-of-living increases in salary for both pay grades GS-9 and GS-11. The cost-of-living raises have further widened the

gap between plaintiff's actual salary and the salary which plaintiff would have received but for his demotion.

37. Plaintiff is a member of the Civil Service Retirement System, in which retirement benefits are calculated based upon the so-called "high three", being the average salary received by a member for the three years of qualified service in which the member's salary was highest. But for plaintiff's demotion, plaintiff's "high three" will be lower than it would have been, and plaintiff's retirement benefits will accordingly be lower.

38. Retirement benefits are periodically adjusted based on the cost-of-living, which adjustments will further widen the gap between plaintiff's retirement benefits and the benefits which he would have received but for the demotion.

39. Plaintiff has retained attorneys to represent him in connection with administrative proceedings and with this litigation, and plaintiff has incurred expenses for legal fees and related costs. The total amount of said fees and costs is not yet known to plaintiff.

RELIEF SOUGHT

WHEREFORE plaintiff prays this court for judgment in favor of plaintiff and against defendant Defense Language Institute-Foreign Language Center, Presidio of Monterey, and against defendant Local 1263, National Federation of Federal Employees, as follows:

1. Against defendants and each of them, for damages equal to the amount of pay which plaintiff lost as herein alleged, together with interest on said sum from May 7, 1978 until paid, and for damages for the diminution of plaintiff's retirement benefits as herein alleged.

2. Against defendants and each of them, for plaintiff's attorneys' fees according to proof.

3. Against defendants and each of them for costs of suit herein.

4. For such other and further relief as the court deems proper.

DATED: October 11, 1981

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EFTHIMIOS A. KARAHALIOS, Plaintiff, vs. DEFENSE LANGUAGE INSTITUTE–FOREIGN LANGUAGE CENTER PRESIDIO OF MONTEREY, and LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES, Defendant.	Case No. C 81 2745 RFP PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of Monterey, State of California; I am over the age of eighteen (18) years and not a party to the above-referenced action. My business address is 335 El Dorado, Suite 7, Monterey, California 93940. On October 13, 1981, I served the FIRST AMENDED COMPLAINT FOR DAMAGES in the above-referenced action on attorneys of record by placing true copies thereof in a sealed envelope and mailing same to the following addresses by United States mail with postage thereon fully prepaid:

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Seaside, CA 93955

I, Celeste Ayers, declare under penalty of perjury that the foregoing is true and correct.

Executed on October 13, 1981, at Monterey, Monterey County, California.

/s/ Celeste Ayers
Celeste Ayers

ARTICLE XVI
DISCIPLINE

Sec. 1. GENERAL. It is agreed that the most effective means of maintaining discipline is through management and Union promotion of cooperation, of sustained good working relationships, and of the self-discipline and responsible performance expected of mature employees. In those cases where specific corrective action becomes necessary, the disciplinary measures taken should have a constructive effect. Disciplinary action will be taken for the purpose of correcting offending employees and problem situations and maintaining discipline and morale among all employees.

Sec. 2. TYPES OF DISCIPLINARY ACTIONS.

A. Informal disciplinary actions such as oral admonitions or written warnings will generally be taken in situations involving minor violations of a rule, regulation, standard of conduct, safety practice, or authoritative instruction.

B. Formal disciplinary actions include written reprimands, suspensions, demotions, and removals and will be taken only for just cause and in accordance with DA and CSC regulations.

Sec. 3. REPRESENTATION.

A. It is agreed that the informal resolution of disciplinary problems is in the best interest of the Employer, the Union and employees. In order to preclude the development of adversary proceedings which would be detrimental to the desired goal of informal resolution of potential disciplinary action, an individual representative will not

be permitted at an informal meeting between an employee and the supervisor. However, nothing herein shall preclude a supervisor from requesting the presence of a Union steward or officer at informal meetings if in the judgment of the supervisor, his presence may facilitate the resolution of the problem.

B. Supervisors or management officials may conduct preliminary investigations into alleged misconduct prior to proposing disciplinary actions. Meetings between supervisors or management officials and employees pursuant to this paragraph are informal meetings.

C. For the purposes of this Article, a formal meeting shall be defined as a meeting where potential discipline is to be discussed and two or more management officials are present with the affected employee. Employees are entitled to request representation in such meetings.

D. Following notification of proposed formal disciplinary action, an employee is entitled to be represented by a person of choice during all subsequent related proceedings. Such representation is authorized in order to permit the employee the maximum opportunity to respond to the charges in a complete and effective manner. This right to representation by a person of choice does not extend to grievances filed over receipt of formal disciplinary action. When such a grievance is filed, employees may be represented only by themselves or the Union.

E. The Employer agrees that in all formal disciplinary actions the employee will be furnished with an extra copy of the notice of proposed disciplinary action and the notice of decision which may be given to the employee's representative. The copies will be annotated "Representative's Copy".

Sec. 4. PROBATIONARY EMPLOYEES. It is recognized that the one year probationary period through which all new DLI employees must pass, is an extension of the initial examining process wherein the employee's suitability for continued employment is subjected to careful scrutiny by management. Accordingly, probationary employees are not entitled to the same job protection rights flowing to non-probationary, permanent employees. Specifically, grievances filed by or on behalf of probationary employees which contest the propriety of disciplinary action, will not be subject to the arbitration process.

Sec. 5. TEMPORARY EMPLOYEES. It is recognized that employees serving on temporary appointments with definite time limitations or intermittent appointments, are employed solely for the purpose of meeting a temporary or intermittent need and are not entitled to the full job protection rights afforded to permanent employees. Specifically, grievances filed by or on behalf of temporary or intermittent employees which contest the propriety of disciplinary action, will not be subject to the arbitration process.

Sec. 6. GRIEVANCES. Grievances contesting the propriety of formal disciplinary action may be filed by the effected [*sic*] employee not sooner than the employee's receipt of the notice of decision but not later than 5 working days after the effective date of the action or return to duty from suspension. The grievance will normally be initiated at Step 2 of the grievance procedure unless there are no officials organizationally situated between the Commandant and the official that signed the notice of decision. In that case, the grievance will be initiated at Step 3.

Sec. 7. PROCEDURAL REQUIREMENTS. When formal disciplinary action is sought against permanent, non-probationary employees, they are entitled to:

A. An advance written notice stating the reasons, specifically and in detail, for the proposed action;

B. A reasonable time for answering the notice of proposed action personally and in writing and for furnishing affidavits in support of the answer;

C. A written notice of decision at the earliest practicable date which informs the employee of the reasons for the action together with pertinent grievance and appeal rights.

ARTICLE XVII
GRIEVANCES

Sec. 1. GENERAL. The grievance procedure agreed upon herein by the Parties shall be the sole procedure, applicable only to the Employer, the Union and employees in the units, for the consideration of grievances. For the purposes of this collective bargaining agreement, a grievance shall be defined as any dissatisfaction, dispute or complaint by an employee or the Union against the Employer concerning personnel policies, practices, or working conditions which are within the scope of authority of the Employer or, complaints by the Employer against the Union. Such matters may include but are not necessarily limited to the following:

A. Interpretation and application of the terms of this collective bargaining agreement;

B. The application of DLI regulations, Department of Army (DA) regulations or the regulations of other appropriate authority;

C. Personal dissatisfactions with working conditions or relationships.

Sec. 2. EXCLUSIONS. Matters excluded from consideration under the grievance procedure include, but are not necessarily limited to the following:

A. Any matter for which a statutory appeals procedure exists;

B. Questions as to interpretation of published DA policies or regulations, provisions of law, or regulations of appropriate authorities outside DA regardless of whether such policies, laws, or regulations are quoted, cited, or otherwise incorporated or referenced in this Agreement;

C. Non-selection for placement or promotion from a group of properly ranked and certified candidates;

D. Frivolous or facetious matters;

E. Notices of proposed disciplinary actions;

F. Informal disciplinary actions as defined in Article XVI;

G. Matters for which no form of personal relief to the employee is appropriate;

H. Complaints pertaining to matters excluded from management's obligation to consult or confer with the Union;

I. Non-adoption of suggestions or disapproval of honorary or discretionary awards.

Sec. 3. GRIEVABILITY. Disputes as to whether a matter is grievable or arbitrable under the provisions of this Agreement, if not resolved by the Parties, may be

referred to arbitration for a decision under the provisions of Article XVIII or referred to the Assistant Secretary of Labor for Labor-Management Relations for decision in accordance with pertinent rules and regulations.

Sec. 4. REPRESENTATION. If an employee or group of employees desire representation in filing a grievance under this grievance procedure, they may be represented only by the Union or themselves. Any employee or group of employees choosing to represent themselves may present such grievances to the Employer and have them adjusted without the intervention of the Union, as long as the adjustment is not inconsistent with the terms of this Agreement and the Union has been given the opportunity to be present at the adjustment. The right of employees to present their own grievances does not extend to use of the arbitration process (Article XVIII). Designation of Union representatives and their use of official time shall be governed by the provisions of Article IV, Sections III and IV.

Sec. 5. The Union and the Employer agree that it is in their mutual interest to resolve grievances at the lowest possible level. With this principle in mind, the Union, unit employees and management will cooperate fully in the investigatory and processing stages of any grievance. Furthermore, the Union agrees to actively discourage employees from filing grievances over frivolous of [*sic*] facetious matters.

Sec. 6. When presenting a greivance [*sic*] under these procedures, the aggrieved will initiate the grievance at the first step unless the Parties mutually agree to initiate the grievance at a higher step or if other provisions in this Agreement dictate otherwise.

Sec. 7. If two or more unit employees requesting representation by the Union have substantially identical grievances and wish to pursue them under Sec. 9. of this Article, the Union shall select one employee's grievance for processing and the outcome of that grievance will be binding on the other employee(s) concerned. When the provisions of this section are to be invoked, the Union will so notify the Employer in writing concurrent with the initiation of the formal grievance. Such written notification will include the names of all grievants together with the name of the employee whose grievance will be pursued through the formal process.

Sec. 8. FORMAT FOR WRITTEN GRIEVANCES AND DECISIONS. To assure that sufficient information is provided to the Union, employees, and management officials when utilizing the grievance procedures outlined herein, forms developed by the Parties and provided by the Employer will be utilized when submitting a written grievance or a written decision on a grievance. These forms may be modifeid [*sic*] upon mutual consent of the Parties without reopening this Agreement. Employee grievance forms may be obtained from supervisors, the Office of Civilian Personnel and Union stewards and officers.

Sec. 9. EMPLOYEE GRIEVANCE PROCEDURE.

Step 1. The grievance shall be taken up orally and discussed between the aggrieved and the appropriate supervisor (normally the immediate supervisor) within 10 work days from the date the employee becomes aware of the incident or decision giving rise to the grievance and attempts will be made to resolve the matter informally. The grievant will normally be represented by the area

steward or alternate, if representation is desired. It is expected that most employee grievances will be resolved at this level and management and the Union agree to promote this concept vigorously. If the grievant's dissatisfaction has not been resolved through this informal discussion, a formal grievance may be initiated within 5 work days by completing and submitting a written grievance to the Step 1 official. Within 5 work days, the supervisor will meet with the grievant and the Union representative (normally the area steward if representation is desired) and any other individuals the supervisor feels may be of assistance in attempting to resolve the grievance. A written decision on the grievance will be provided to the employee and the representative, if any, within 10 work days after receipt of the written grievance.

Step 2. If the grievance is not resolved at Step 1, the written grievance along with the written decision may be presented within 5 work days of the employee's receipt of the written decision from Step 1 to the next level supervisor for processing. This supervisor will be responsible for promptly forwarding the grievance to the appropriate official for action. Within 5 work days of receipt, the designated official will meet with the grievant, the Union representative (normally the steward if representation is desired) and anyone else the official feels may be of assistance in attempting to resolve the grievance. The written decision will be rendered within 10 work days after conclusion of the meeting(s).

Step 3. If the dissatisfaction is not settled at Step 2, the written grievance may be forwarded within 5 work days of the grievant's receipt of the Step 2 decision, together with the decisions from Step 1 and 2, through the Chief,

Office of Civilian Personnel to the DLI Commandant for consideration and decision. The Commandant will arrange for whatever review and investigation he deems necessary and will provide the aggrieved and the designated Union representative, if any, his written decision within 15 work days of receipt of the grievance in the Office of Civilian Personnel. In addition to the appropriate area steward, a Union official may also accompany the grievant in any discussion held between the Commandant or his designee and the grievant.

Sec. 10. UNION GRIEVANCES. A Union grievance is defined as a dispute over the interpretation or application of this Agreement where no form of relief that is personal to a unit employee is appropriate. A Union grievance shall be submitted in writing (which shall substantially follow the format of an employee grievance) by the Union president or his designee with [*sic*] 15 work days of the date he became aware of the incident or decision giving rise to the grievance. The grievance may be processed beginning with Step 3.

Sec. 11. EMPLOYER GRIEVANCES. An Employer grievance over the interpretation or application of this Agreement shall be submitted by the DLI Commandant or his designee in writing to the Union president within 15 work days of the date he became aware of the incident or decision giving rise to the grievance. The Union president will meet with the Commandant or his designee within 5 work days of his receipt of the grievance and attempt to resolve the dispute. The Union president will notify the DLI Commandant of his decision in writing within 10 work days of the meeting.

Sec. 12. In the event satisfactory resolution of the grievance is not achieved through the proceedings outlined in

Sections 9, 10 and 11, the Union or the Employer may, within 10 work days of the final written decision, elect to have the grievance settled by arbitration through the procedures in Article XVIII. The right of employees to present their own grievance does not extend to invoking arbitration.

Sec. 13. TIME LIMITS. In processing a grievance, the time limits will be strictly observed by both Parties. Failure of the Employer or the Union to observe the time limits shall entitle the other party to advance the grievance to the next step or stage. Failure by the aggrieved to present his grievance within the time limits at any step in this Article so that the grievance is not timely received by the individual specified in these procedures will result in the termination of the grievance, and it will be returned to the aggrieved with the reason for its termination. A written request, however, for extension of the time limits may be granted in unusual circumstances, if mutually agreed upon by the Parties.

ARTICLE XVIII
ARBITRATION

Sec. 1. GENERAL. If the Employer and the Union fail to settle any grievance processed under the negotiated grievance procedure, either party may within 10 work days after receipt of the final decision, notify the other party of a request to invoke arbitration.

Sec. 2. SELECTION PROCEDURES. Within 5 work days from the date of the request for arbitration the Parties shall meet and make a good faith attempt to develop a mutually acceptable stipulation of the issue(s). If unable to agree on a stipulation of issues, each Party will

prepare his own and the selected arbitrator shall be empowered to frame the issue, taking into consideration the positions of the Parties and the terms of this Agreement. Within 10 work days of the request, the Parties shall jointly submit a request for a list of at least 5 impartial persons qualified to act as arbitrators, together with the stipulation(s) of the issue(s) to the Federal Mediation and Conciliation Service (FMCS) or other mutually agreeable source. Within 5 working days of receipt of the list of arbitrators the Parties will conduct a telephonic survey to determine availability, costs, etc. If, after completion of the survey, the Parties cannot mutually agree upon one of the listed arbitrators, the Employer and the Union will each strike one arbitrator's name from the list and repeat this procedure until only one name is left, who shall be the duly selected arbitrator. The method for determining who strikes first shall be by coin toss (the official who selects the face up side of the coin shall make the first strike). If for any reason either Party refuses to participate in the selection of an arbitrator and all requirements for arbitration in this Agreement are satisfied, the FMCS shall be empowered to make a direct designation of an arbitrator to hear the case.

Sec. 3. STIPULATION OF FACTS. Following completion of the selection process, the Parties will prepare a stipulation of facts which will be fowarded [*sic*] to the arbitrator prior to the commencement of the hearing. The stipulation of facts will normally include a copy of this Agreement, the written grievance from each step, the written decision from each step, the stipulation(s) of the issue(s), and any other mutually agreeable documents.

Sec. 4. SCOPE OF AUTHORITY. The arbitrator is empowered to rule on the interpretation and application

of this Agreement and on the application of pertinent laws and regulations of appropriate authority. This authority, however, does not extend to the interpretation of such laws and regulations. The arbitrator shall have no power to add to or subtract from, disregard or modify any of the terms of this Agreement and the award must be fully consistent with all pertinent laws, Executive Orders and regulations of higher authority. The arbitrator shall have no authority to substitute his judgment for that of the Employer as to reasonableness of existing rules and regulations of the Employer and shall be limited to deciding whether the facts established by the Parties justify the action of the Employer as being within the reasonable exercise of management discretion.

Sec. 5. COSTS. The arbitrator's fee and other expenses related to the arbitration hearing shall be borne equally by the Employer and the Union. The cost of a verbatim transcript, if any, will be borne by the requesting Party(s) unless requested by the Arbitrator in which case the costs will be shared equally. The arbitration hearing will be held in facilities made available by the Employer during the regular day shift hours (0745-1645) Monday through Friday, insofar as it is practicable.

Sec. 6. DUTY STATUS. The aggrieved, the Union representative, and the aggrieved's witnesses approved by the arbitrator who are otherwise in duty status shall be excused from duty to participate in the arbitration hearing without loss of pay or charge to annual leave.

Sec. 7. TIMELINESS. The arbitrator will be requested by the Parties to render his decision as quickly as possible but in any event no later than 30 calendar days after the conclusion of the hearing unless the Parties agree otherwise.

Sec. 8. EXCEPTIONS. The arbitrator's decision will be binding on the Parties. However, either Party may file exceptions to the arbitrator's award with the Federal Labor Relations Council under regulations prescribed by the Council and other appropriate authority.

Sec. 9. APPLICABILITY. The provisions of this Article shall not be applicable to probationary employees, intermittent employees, or employees serving under time-limited appointments.

Sec. 10. PRECEDENT. While it is recognized that past published arbitration decisions may serve as a useful guide to the arbitrator concerning reasoning used and principles enunciated, because of the dynamic nature of the Federal labor-management relationship, each case should be judged on its individual merits.

ARTICLE VI
GRIEVANCES

Section 1. General Goals. The Employer and the Union recognize the importance of settling disagreements and disputes promptly, fairly, and in an orderly manner that will maintain the self-respect of the employee and be consistent with the principles of good management. To accomplish this, every reasonable effort will be made to settle grievances expeditiously and at the lowest level of supervision.

Section 2. Scope. The grievance procedure agreed upon herein by the Parties shall be the sole procedure available to the Union and unit employees for the consideration of complaints over the interpretation or application of this Agreement or complaints over personnel policies,

practices, and conditions of employment which affect unit employees and their employment. In accordance with Section 13. of E. O. 11491, as amended, the Employer may also utilize the grievance procedure to resolve disputes over interpretation or application of the Agreement.

Section 3. Exclusions. Matters excluded from consideration under the grievance procedure include, but are not necessarily limited to the following:

A. any matter for which a statutory appeals procedure exists (see Appendix B for sample listing);

B. non-selection for placement or promotion from a group of properly ranked and certified candidates;

C. complaints pertaining to matters excluded from management's obligation to consult or confer with the Union;

D. non-adoption of suggestions or disapproval of honorary or discretionary awards.

Section 4. Grievability. Disputes as to whether a matter is grievable or arbitrable under the provisions of this Agreement, if not resolved by the Parties, may be referred to arbitration for a decision under the provisions of Article VII or referred to the Assistant Secretary of Labor for Labor-Management Relations for decision in accordance with pertinent rules and regulations. In the event of a dispute between the Parties that could be subject to both the grievance procedure and the procedures of Section 19 of Executive Order 11491 as amended, the grievance procedure shall be utilized.

Section 5. Representation. Only the Union or a representative approved by the Union may represent employees in grievances. However, any employee or group of em-

ployees may present a grievance and have it adjusted without the intervention of the Union provided that the Union shall have the right to have a representative present at all discussions with the grievant unless the grievant objects for reasons of privacy. In any case, the Union shall have the right to have a representative present at the adjustment and the adjustment must be consistent with the terms of this Agreement. If an employee is represented by the Union in a grievance, a meeting with the employee on the grievance will not be held without giving the Union an opportunity to be present. In exercising their right to present a grievance, employees and their representatives shall be unimpeded and free from restraint, coersion [*sic*], discrimination, or reprisal.

Section 6. Access to Records. The Employer will, upon request, furnish an aggrieved employee and the designated representative, information from grievant's official personnel records which have a direct bearing on the grievance. In addition, they will be provided full access to and where reasonable, extracts or copies of all relevant personnel regulations and official directives.

Section 7. Time Limits. In processing a grievance, the time limits will be strictly observed by both Parties. Failure of the Employer or the Union to observe the time limits shall entitle the other Party to advance the grievance to the next step or stage. Failure by an aggrieved employee to present the grievance within the proper time limits will result in termination of the grievance. A written request for an extension of the time limits may be granted upon mutual consent of the Parties.

Section 8. Informal Grievance. The informal grievance shall first be taken up by the grievant and steward if he/she elects to have representation, either orally or in

writing with the lowest level management official who has authority to render a decision (see Section 10.). The informal grievance must be presented within (15) fifteen work days of the date the employee first became aware of the grievance. A decision will be given to the grievant within five (5) work days after presentation of the informal grievance. The decision shall be in writing if the informal grievance is presented in writing.

Section 9. Formal Grievance.

Step 1. If the matter is not satisfactorily settled following the informal stage, grievant may within 5 work days after the informal decision, submit the matter in writing on a standard grievance form to the next level official. The grievance should clearly identify the grievant, the nature of dissatisfaction, provisions of the Agreement alleged to have been violated (if any) and the personal relief sought. The official will meet with the grievant(s) and the steward (if representation is desired) within (5) five work days after receipt of the grievance. The official shall give the grievant and his/her representative the written answer along with documents submitted by the grievant within (5) five work days after the meeting(s).

Step 2. If the matter is not satisfactorily settled at the first step, grievant may within 5 work days after the step 1 decision advance the grievance to the next level official.

The written grievance will be accompanied by the step 1 grievance and decision together with any other additional material which has a bearing on the issue. The official will meet with the grievant(s) and the steward within 5 work days of receipt of the grievance. The written decision will be rendered within 10 work days after the meeting(s), and will be accompanied by the documents submitted by the grievant(s).

Step 3. If the matter is not satisfactorily settled at the second step, grievant may within 10 work days after the Step 2 decision advance the grievance to the Commandant. The written grievance will be accompanied by the Steps 1 and 2 grievances and decisions together with any additional material which has a bearing on the issue. The Commandant or his designee will meet with the grievant(s) and the Union representative within 10 work days of receipt of the grievance. The written decision will be rendered within 10 work days of the meeting(s), and will be accompanied by documents submitted by the grievant(s).

Arbitration. If the grievance is not satisfactorily settled at the third step, the Union or the Employer may invoke arbitration for final and binding decision.

Section 10. Grievance Officials. For the purposes of this grievance procedure, the following officials are designated to consider employee grievances at the stage/steps indicated:

(1) Informal-chairperson in consultation with the supervisor;

(2) Step 1 - Group Chief

(2) [*sic*] Step 2 - Director of Training

(4) Step 3 - Commandant

B. Other Unit Employees:

(1) Informal - first line supervisor

(2) Step 1 - second line supervisor

(3) Step 2 - Chief of Directorate or major staff office

(4) Step 3 - Commandant

Section 11. Class Grievances. If two or more unit employees requesting representation by the Union have substantially identical grievances and wish to pursue them under Section 9. of this article, the Union may select one employee's grievance for processing and the outcome of that grievance will be binding on the other employee(s) concerned. When the provisions of this Section are to be invoked, the Union will so notify the Employer in writing concurrent with the initiation of the formal grievance. Such written notification will include the names of all grievants together with the name of the employee whose grievance will be pursued through the formal process.

Section 12. Employer Grievances. An Employer grievance over the interpretation or application of this Agreement shall be submitted by the DLIFLC Commandant or his designee to the Union president within 15 work days of the date be [*sic*] became aware of the incident or decision giving rise to the grievance. The Union president will meet with the Commandant or his designee within 10 work days of his receipt of the grievance and attempt to resolve the dispute. The Union president will notify the DLIFLC Commandant of his decision in writing within 10 work days of the meeting.

ARTICLE VII
ARBITRATION

Section 1. General. If the Employer and the Union fail to settle any grievance processed under the Negotiated Grievance Procedure, either Party may within 15 work days after receipt of the third step decision notify the other Party of a request to arbitrate.

Section 2. Selection Procedures. Within 5 work days of the request, the Parties shall jointly submit a request to

the Federal Mediation and Conciliation Service (FMCS) or other mutually agreeable source for a list of at least 7 impartial persons qualified to act as arbitrators. Within 5 working days of receipt of the list of arbitrators the Parties will meet and if unable to agree upon one of the listed arbitrators the Employer and the Union will each strike one arbitrator's name from the list and repeat this procedure until only one name is left, who shall be the duly selected arbitrator. The method for determining who strikes first shall be by coin toss (the official who selects the face up side of the coin shall make the first strike). If for any reason either Party refuses to participate in the selection of an arbitrator and all requirements for arbitration in the Agreement are satisfied, the FMCS shall be empowered to designate an arbitrator to hear the case.

Section 3. Stipulation of Facts. The Parties shall meet and make a good faith attempt to develop a mutually acceptable stipulation of the issue(s). If unable to agree on a stipulation of issue(s), each Party will prepare his/her own and the selected arbitrator shall be empowered to frame the issue, taking into consideration the positions of the Parties and the terms of this Agreement. The Parties will also prepare a stipulation of facts which will be forwarded to the arbitrator prior to the commencement of the hearing. The stipulation of facts will normally include a copy of this Agreement, the written grievance from each step, the written decision from each step, the stipulation(s) of the issue(s), and any other mutually agreeable documents.

Section 4. Scope of Authority. The arbitrator is empowered to rule on the interpretation and application of this Agreement and pertinent laws and regulations of

appropriate authority. When the interpretation of a regulation of higher authority is in dispute, the arbitrator will give due weight to interpretations provided by the Employer prior to an award being rendered. The arbitrator shall have no power to add to or subtract from, disregard or modify any of the terms of this Agreement or regulations and policies of the Employer and the award must be fully consistent with all pertinent laws, executive orders and regulations of higher authority.

Section 5. Costs. The arbitrator's fee, the expenses of arbitration including stenographic assistance, cost of transcript, cost of arbitrator's travel expenses and per diem shall be shared equally by the Parties. The arbitration hearing will be held in well ventilated facilities made available by the Employer during the regular day shift hours (0745-1645) Monday through Friday insofar as it is practicable. The arbitrator will provide the Parties with an itemized bill which summarizes services rendered.

Section 6. Duty Status. The aggrieved, the union representative, and the aggrieved's witnesses approved by the arbitrator who are in duty status shall be excused from duty to participate in the arbitration hearing without loss of pay or charge to annual leave.

*Section 7. Timeliness.*The arbitrator will be requested by the Parties to render the decision as quickly as possible but in any event no later than 30 calendar days after the conclusion of the hearing unless the Parties agree otherwise.

Section 8. Exceptions. The arbitrator's decision will be binding on the Parties. However, either Party may file exceptions to the arbitrator's award with the Federal Labor Relations Council under regulations prescribed by the council and other appropriate authority.

Section 9. Applicability. The provisions of this article shall not be applicable to removal actions involving probationary employees, intermittent employees or employees serving under time-limited appointments.

ARTICLE XXII
DISCIPLINE

Section 1. General. Formal disciplinary actions include written reprimands, suspensions, demotions, and removals and will be taken only for just cause.

Section 2. Representation.

A. It is agreed that the informal resolution of disciplinary problems is in the best interest of the Employer, the Union and employees. In order to preclude the development of adversary proceedings which would be detrimental to the desired goal of informal resolution of potential disciplinary action, an individual representative will not be permitted at a non-formal meeting between an employee and the supervisor. However, nothing herein shall preclude a supervisor from requesting the presence of a Union steward or officer at non-formal meetings if in the judgment of the supervisor, his/her presence may facilitate the resolution of the problem.

B. Supervisors or management officials may conduct preliminary investigations into alleged misconduct prior to proposing disciplinary actions. Meetings between supervisors or management officials and involved employees pursuant to this paragraph are non-formal meetings.

C. For the purposes of this article, a formal meeting shall be defined as a meeting where potential discipline is

to be discussed and two or more management officials are present with the affected employee. In such meetings, employees are entitled to a Union representative if desired.

D. Following notification of proposed disciplinary action, a competitive service employee is entitled to be represented by a person of choice but, an excepted service employee may be represented only by the Union or someone approved by the Union. Such representation is authorized in order to permit the employee the maximum opportunity to respond to the charges in a complete and effective manner. If a grievance is filed under the terms of this Agreement over the propriety of formal disciplinary action, the employee may only be represented by themselves, the Union, or someone approved by the Union.

E. The Employer agrees that in all formal disciplinary actions the employee will be furnished with an extra copy of the notice of proposed disciplinary action and the notice of decision which may be given to the employee's representative. The copies will be annotated "representative's copy".

Section 4. Probationary Employees. It is recognized that the one year probationary/trial period through which all new DLIFLC employees must pass, is an extension of the initial examining process wherein the employee's suitability for continued employement [*sic*] is subjected to careful scrutiny by management. Accordingly, probationary/trial period employees are not entitled to the same job protection rights flowing to non-probationary, permanent employees. Specifically, grievances filed by or on behalf of probationary/trial period employees which contest the propriety of removals will not be subject to the arbitration process.

Section 5. Temporary Employees. It is recognized that employees serving on temporary appointments with definite time limitations or intermittent appointments, are employed solely for the purpose of meeting a temporary or intermittent need and are not entitled to the full job protection rights afforded to permanent employees. Specifically, grievances filed by or on behalf of temporary or intermittent employees which contest the propriety of removals, will not be subject to the arbitration process.

Section 6. Grievances. Grievances contesting the propriety of formal disciplinary action may be filed by the affected employee not sooner than the employee's receipt of the notice of decision but not later than 5 working days after the effective date of the action or return to duty from suspension. The grievance will normally be initiated at Step 2 of the grievance procedure unless there are no officials organizationally situated between the Commandant and the official that signed the notice of decision. In that case, the grievance will be initiated at Step 3.

Section 7. Excepted Service Procedural Requirements. When formal disciplinary action is sought against "permanent" non-trial period excepted service employees, they are entitled to:

A. an advance written notice stating the reasons, specifically and in detail, for the proposed action;

B. a reasonable time for answering the notice of proposed a ion personally and in writing and for furnishing affadavits [*sic*] in support of the answer;

C. a written notice of decision at the earliest practicable date which informs the employee of the reasons for the action together with pertinent grievance and appeal rights; and

D. reasonable access to documents and evidences that were used in support of the discipline.

Section 8. Competitive Service Procedural Requirements. When formal disciplinary action is sought against "permanent", non-probationary, competitive service employees, procedural requirements of FPM Chapter 752 will be followed.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
200 Constitution Avenue, NW.
Washington, DC 20216

OFFICE OF THE GENERAL COUNSEL

JUN 17 1980

Richard DeStefano
Duffy and DeStefano
Attorneys At Law
335 El Dorado, Suite 7
Monterey, California 93940

Re: Defense Language Institute
Foreign Language Center
Presidio of Monterey, California
Case No. 9-CA-53
and
National Federation of Federal
Employees, Local 1263
Case No. 9-CO-5

Dear Mr. DeStefano:

Your appeals of the Regional Director's refusal to issue complaints in the above-named cases, in which it was alleged that the Charged Parties violated section 7116(a)(1) and (2), and sections 7116(b)(8) and 7114(a) (1), respectively, of the Federal Service Labor-Management Relations Statute, have been considered carefully.

In agreement with the Regional Director, it was concluded that further proceedings in Case No. 9-CA-53 are unwarranted. In this regard, the evidence does not establish that the Charged Party (the Defense Language Institute) had an obligation to invoke arbitration in behalf of the Charging Party, an individual, because of an alleged conflict of interest on the part of the exclusive representative. Moreover, the evidence is insufficient to establish that the Charged Party's conduct in this case was otherwise violative of the Statute.

EXHIBIT 16

Contrary to the Regional Director, it was concluded in Case No. 9-CO-5 that the Charged Party (National Federation of Federal Employees, Local 1263) violated its duty to fairly represent all members of the bargaining unit equally in its consideration of whether to invoke arbitration in behalf of the individual Charging Party. In this regard, the evidence establishes that the Charged Party based its refusal to invoke arbitration on considerations unrelated to the merits of the Charging Party's grievance. Under these circumstances, the Charged Party's conduct was viewed as inconsistent with its representational responsibilities and thus violative of the Statute.

Accordingly, your appeal in Case No. 9-CA-53 is denied and your appeal in Case No. 9-CO-5 is granted. Case No. 9-CO-5 is remanded to the Regional Director, who is hereby directed to issue a complaint in this matter, absent settlement.

For the General Counsel.

Sincerely,
/s/ RICHARD A. SCHWARZ
Richard A. Schwarz
Assistant General Counsel for Appeals

cc: Regional Director, Region 9

Martin Frantz, Labor Relations Officer, Defense Language Institute, Presidio of Monterey, California 93940

Rogelio A. Castro, President, National Federation of Federal Employees, Local 1263, P.O. Box 5836, Monterey, California 93940

FEDERAL LABOR RELATIONS AUTHORITY

NATIONAL FEDERATION OF FEDERAL EMPLOYEES LOCAL 12633 MONTEREY, CALIFORNIA -Charged Party -AND- EFTHIMIOS A. KARAHALIOS -Charging Party	CASE NO. 9-CO-5

SETTLEMENT AGREEMENT
(LABOR ORGANIZATION RESPONDENT)

The undersigned Labor Organization and the undersigned Charging Party in settlement of the above matter, and subject to the approval of the Regional Director on behalf of the Federal Labor Relations Authority, HEREBY AGREE AS FOLLOWS:

WITHDRAWAL OF CHARGE-Upon approval of this Agreement by the Regional Director the Charging Party requests withdrawal of the Charge in the above-named case.

POSTING OF NOTICE-The Labor Organization will post copies of the Notice To All Members, attached hereto and made a part hereof, in conspicuous places in and about its office(s), including all places where notices to members are customarily posted for a period of at least sixty (60) consecutive days from the date of posting. The Labor Organization will submit signed copies of said Notice to the Regional Director who will forward them to the Agency whose employees are involved herein, for posting in conspicuous places in and about the Agency's premises where they shall be maintained for a period of at least sixty (60) consecutive days from the date of posting.

EXHIBIT 17

OTHER ACTION TO BE TAKEN-

NONE

COMPLIANCE WITH NOTICE-The Labor Organization will comply with all the terms and provisions of said Notice.

REFUSAL TO ISSUE COMPLAINT-In the event the Charging Party fails or refuses to become a party to this Agreement, then, if the Regional Director in his discretion believes it will effectuate the policies of Chapter 71 of Title 5 of the U.S.C., he shall decline to issue a Complaint herein and this Agreement shall be between the Labor Organization and the undersigned Regional Director. A review of such action may be obtained pursuant to Section 2423.10(b) of the Regulations of the Federal Labor Relations Authority if a request for review is filed within ten (10) days thereof. This agreement is contingent upon the General Counsel sustaining the Regional Director's action in the event of review. Approval of this Agreement by the Regional Director shall constitute withdrawal of any Complaint(s) and Notice of Hearing heretofore issued in this case.

PERFORMANCE-Performance by the Labor Organization of the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director or, in the event the Complainant does not enter into this Agreement, performance shall commence immediately upon receipt by the Labor Organization of advice that no review has been requested or that the General Counsel has sustained the Regional Director.

NOTIFICATION OF COMPLIANCE-The undersigned (party) (parties) to this Agreement will notify the Regional

Director in writing what steps the Labor Organization has taken to comply herewith. Such notification shall be made within five (5) days, and again after sixty (60) days, from the date of the approval of this Agreement, or, in the event the Charging Party does not enter into this Agreement, after the receipt of advice that no review has been requested or that the General Counsel has sustained the Regional Director.

COMPLIANCE WITH SETTLEMENT AGREEMENT-Contingent upon compliance with the terms and provisions hereof, no further action shall be taken in the above case.

National Federation of Federal Employees, Local 12633	Efthimios A. Karahalios
(Labor Organization)	(Charging Party)
By: _____ _____ (Type or Print Name and Title) (Date)	By: _____ _____ (Type or Print Name and Title) (Date)
_____ (Signature)	_____ (Signature)
	Approved: _____ (Date)
	By: _____ Regional Director

FLRA Form 57
(1-79)

NOTICE TO ALL MEMBERS

PURSUANT TO

A SETTLEMENT AGREEMENT APPROVED BY THE
REGIONAL DIRECTOR ON BEHALF OF THE

FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR MEMBERS THAT:

WE WILL NOT inform employees that where two or more employees are seeking one position, the Union, the National Federation of Federal Employees, Local 1263, cannot represent all such employees in the contractual grievance procedure.

WE WILL NOT inform employees that it would be a conflict of interest for the Union, the National Federation of Federal Employees, Local 1263, to represent all such employees.

WE WILL NOT in any like or related manner interfere with, restrain or coerce any employees in the exercise of their rights under the Statute.

National Federation of Federal Employees, Local 1263
(Labor Organization)

Dated _____ By _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority whose address is: FEDERAL LABOR RELATIONS AUTHORITY, Room 11408, P.O. Box 36016, 450 Golden Gate Avenue, San Francisco, California 94102.

Case No. 9-CO-5

FLRA Form 54
(1-79)

(Karahalios I)

Efthimios A. KARAHALIOS, Plaintiff,

v.

DEFENSE LANGUAGE INSTITUTE FOREIGN LANGUAGE CENTER PRESIDIO OF MONTEREY, and Local 1263, National Federation of Federal Employees, Defendants.

No. C-81-2745 RFP.

United States District Court,
N. D. California

March 9, 1982.

Thomas R. Duffy, Monterey, Cal., for plaintiff.

Deborah Seymour, Asst. U. S. Atty., San Francisco, Cal., Paul Blankenstein and Mark Chavez, Dept. of Justice, Washington, D.C., for defendants.

ORDER

PECKHAM, Chief Judge.

Efthimios Karahalios is employed by the Defense Language Institute ("DLI"), a federal agency, as an instructor of Greek. He has filed suit against DLI and Local 1263, National Federation of Federal Employees ("the union"), the exclusive representative of DLI employees. The events giving rise to the suit are as follows.

In early 1977, plaintiff was promoted from instructor (pay grade GS-9) to course developer (pay grade GS-11) through a competitive selection process. Shortly thereafter, Simon Kuntelos, another Greek instructor at DLI, filed a grievance.[1] He had been a course developer from 1963 until 1971, at which point his rank had been reduced to instructor as a result of the elimination of the course developer position. When the position became available again and was given to plaintiff, Kuntelos filed the grievance mentioned above. He was denied relief by DLI. The union then demanded that his grievance be arbitrated. The arbitrators decided that the competitive selection process which had been used to select plaintiff was erroneous. The position was reopened.

Throughout Kuntelos' grievance and arbitration, neither the union nor DLI notified plaintiff of the controversy. He was finally informed of the arbitrators' decision on February 21, 1978, and was told he could respond in writing. Kuntelos was ultimately awarded the position of course developer on April 6, 1978. Plaintiff's grade was reduced to GS-9.

Plaintiff filed grievances with DLI in May and October of 1978. They were denied on December 20, 1978. Plaintiff then requested that the union invoke arbitration. It refused, on the grounds that advocacy of plaintiff's position would conflict with the union's previous advocacy of Kuntelos's position, and with the binding decision the arbitrators had made concerning Kuntelos' grievance. On January 17, 1979, plaintiff himself attempted to invoke arbitration. The union and DLI both refused to arbitrate.

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[1] Unlike plaintiff, Kuntelos is a member of the union and of the union's board of directors.

On May 16, 1979, plaintiff filed unfair labor practice charges against the union and DLI, with the Federal Labor Relations Authority ("FLRA"). The Regional Director of the FLRA decided not to file complaints against either the union or DLI. Plaintiff requested that the General Counsel of the FLRA review this decision. The General Counsel affirmed the Regional Director's decision with respect to the charge against DLI, but reversed as to the union, finding that, by deciding not to invoke arbitration on plaintiff's behalf, the union had violated its duty to represent all members of the bargaining unit equally. The General Counsel directed the Regional Director to issue a complaint against the union, absent settlement. The union and the Regional Director reached a settlement agreement whereby the union would notify its members that, in future, it would not inform employees that it could not represent more than one employee seeking the same position. The settlement agreement afforded no relief to plaintiff as an individual. Plaintiff requested that the General Counsel review the settlement as to the union, and reconsider the decision not to issue a complaint against the DLI. Both requests were denied.

Plaintiff then filed this action. In his First Amended Complaint, he alleges that the union breached its duty of fair representation, and that DLI breached the collective bargaining agreement. In addition, he asserts two constitutional claims against DLI. Both defendants filed motions to dismiss the claims relating to the labor disputes, arguing that this court lacks subject matter jurisdiction over them.[2] In addition, DLI moved to dismiss the constitutional claims.

[2] The union requests summary judgment, in the alternative.

I. *Subject Matter Jurisdiction Over Unfair Representation and Breach of Collective Bargaining Agreement Claims*

A. Applicable Body of Law

Prior to January 11, 1979, labor-management relations in the federal service were governed by Executive Order 11491, as amended. 5 U.S.C.A. § 7101, note. That order authorized federal employees to form labor organizations. It also set up an administrative scheme for enforcing the provisions of the order. It did not provide a role for the federal judiciary in this scheme. Defendants argue that the order is controlling, and that, as a result, this court has no jurisdiction over any of plaintiff's claims concerning labor-management relations in the federal sector.

Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. § 7101 *et seq.* ("the Act") revised the administrative procedures set forth in Executive Order 11491, and provided opportunities for limited judicial review not previously available. Thus, the first question we must address is which body of law applies to the instant case—the Executive Order, or the Act.

The Act became effective on January 11, 1979. A savings clause makes the Act inapplicable to cases instituted before its effective date:

> No provision of this Act . . . shall affect any administrative proceedings pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted.

5 U.S.C.A. § 1101, note (Supp.1981). Under the savings clause, the question is whether any administrative pro-

ceedings were pending in the present case on January 11, 1979. If such proceedings were pending, the Executive Order applies. If there were no proceedings pending on January 11, 1979, the Act applies.

The most recent version of the federal regulations issued during the transition from the Executive Order to the Act indicates that in order for an administrative proceeding to have been "pending" as of January 11, 1979, such that the old Executive Order should apply, the proceeding must have been filed with the FLRA by that date. It is not enough for the events triggering the administrative proceeding to have occurred prior to January 11, 1979:

> § 2400.2 Processing of unfair labor practice, representation, grievability/arbitrability and national consultation rights cases.
>
> All unfair labor practice, representation, grievability/arbitrability and national consultation rights cases pending before the Assistant Secretary and the Vice Chairman on December 31, 1978 (including cases the time limit for which an appeal to the Council has not expired under the Council's rules and regulations), all such cases pending before the Council on December 31, 1978, and all such cases filed with the Authority during the period January 1 through January 10, 1979, shall be processed by the Authority in accordance with the Rules and Regulations [promulgated under the Executive Order].

5 C.F.R. 845 § 2400.2 (1981). *Compare* earlier version at 5 C.F.R. 642 § 2400.2 (1979). It is true, as defendants state, that the transitional regulations are for the internal use of the FLRA and are not binding on the courts. But they are not inconsistent with the savings clause, which *is* binding upon the courts.

If analyzed under the transitional regulations of the FLRA, the present case would be governed with the new Act, for, although the events which gave rise to this action all occurred prior to January 11, 1979, Karahalios filed his unfair labor practice charges with the FLRA on May 16, 1979, well after the effective date of the new Act. The language of the savings clause, as well as the FLRA's transitional regulations, indicate that the present lawsuit should be governed by the new Act, rather than by the old Executive Order. We so hold.[3]

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[3] The Merit System Protection Board ("MSPB") has construed the savings clause in a different fashion:

> "Pending" is considered to encompass existing agency proceedings, and appeals before the Board or its predecessor agencies, that were subject to judicial review or under judicial review on January 11, 1979, the date on which the Act became effective. *An agency proceeding is considered to exist once the employee has received notice of the proposed action.*

44 Fed. Reg. 38349, 38360-61 (1979) (emphasis added). Under that interpretation, the present action would be governed by the Executive Order, since Karahalios received notice of the reduction in pay grade on February 21, 1978, and an agency proceeding thus "existed" on that date.

The MSPB interpretation of the savings clause—that an agency proceeding exists if the contested personnel action occurred prior to January 11, 1979—has apparently been followed only in appeals from MSPB decisons. *See, e.g., Ellis v. Merit Systems Protection Board*, 613 F.2d 49 (3d Cir.1980); *Kyle v. Interstate Commerce Commission*, 609 F.2d 540 (D.C.Cir.1980); *Motley v. Secretary of the United States Department of the Army*, 608 F.2d 122 (5th Cir.1979). The courts have been inclined to "[respect] the Board's interpretation of the savings clause . . . in accordance with the judicial deference usually accorded to the interpretation made by the agency charged with a statute's administration." *Kyle v. Interstate Commerce Commission, supra*, 609 F.2d at 542. The rationale for the interpretation given the savings clause in MSPB appeals appears to turn upon the statute of limitations for judicial review of actions brought before the MSPB. Under the new Act, a peti-

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B. *Subject Matter Jurisdiction Under the Civil Service Reform Act of 1978*

Defendants contend that, even if the present action is governed by the new Act, as we have held, the federal district courts lack subject matter jurisdiction over actions such as the present one. The new Act does provide a role for the federal judiciary, but, as defendants point out, that role is narrowly circumscribed.[4] In contrast, Congress has entrusted a broad range of functions to the FLRA, the specialized agency which administers and enforces the provisions of the Act.[5]

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tion for appellate review of a decision by the MSPB must be filed within 30 days of the Board's final order—a significantly shorter filing period than the six years afforded under prior law. The courts were concerned that any case even arguably covered by the prior law should be afforded the more liberal statute of limitations period, given that individuals who had experienced adverse personnel actions prior to January 11, 1979 may have been relying upon the six year time for filing. Thus, the courts adopted the MSPB's expansive view as to when the prior law should control. *Id.* No such difficulties concerning the statute of limitations exist in cases of the present nature. The instant case is not an appeal from an administrative agency, arguably controlled by conflicting statutes of limitations. Consequently, in the context of an action for breach of the duty of fair representation and breach of a collective bargaining agreement, we are disinclined to follow the somewhat tortuous reading of the savings clause given in appeals from MSPB decisions.

[4] The Act explicitly empowers the federal courts to act in only three instances. (The National Labor Relations Act ("NLRA") contains parallel provisions empowering the federal courts to act in the context of private sector labor management relations.) First, the Act makes judicial review of final orders of the FLRA available to any aggrieved party, in the court of appeals. 5 U.S.C. § 7123(a). (*Cf.* 29 U.S.C. § 160(f).) Second, it provides that the FLRA may itself petition the court of appeals for the enforcement of any FLRA order and for appropriate temporary relief or restraining orders. 5 U.S.C. § 7123(b). (*Cf.* 29 U.S.C. § 160(e).) Third, the FLRA, upon issuing an unfair labor practice complaint, may petition a federal district court for temporary injunctive relief. 5 U.S.C. § 7123(d). (*Cf.* 29 U.S.C. § 160(j).)

[5] The FLRA is responsible for providing leadership in establishing policies and guidance relating to matters covered by the Act, and has

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It is defendants' contention that plaintiff is simply alleging that defendants have committed unfair labor practices under 5 U.S.C. § 7116, and that plaintiff's claims are therefore under the exclusive jurisdiction of the FLRA, just as most conduct arguably protected by the NLRA or arguably prohibited by its unfair labor practices provisions is under the exclusive jurisdiction of the *National Labor Relations Board. Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). Thus, they say, plaintiff cannot bring an action for breach of the duty of fair representation and breach of the collective bargaining agreement in federal district court. His only recourse is to pursue his administrative remedies (which he has done), and then appeal to the Ninth Circuit from a final order of the FLRA.

This is evidently a case of the first impression on this question. The jurisdiction of the federal courts under the Act has so far been decided only in contexts in which the plaintiff has requested injunctive relief. *See, e.g., United States v. Professional Air Traffic Controllers Organization (PATCO)*, 653 F.2d 1134 (7th Cir.1981), *cert. denied*, _____ U.S. _____, 102 S.Ct. 639, 70 L.Ed.2d 617 (1981) (district court did have jurisdiction to enjoin

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responsibility for carrying out the purposes of the Act. 5 U.S.C. § 7105(a)(1). The FLRA is also the body which handles unfair labor practice charges "in a manner essentially identical to National Labor Relations Board practices in the private sector." S.Rep.No. 969, 95th Cong., 2d Sess. 106 (1978). The procedures for handling unfair labor practice charges are outlined at 5 U.S.C. § 7118, as are the FLRA's remedial powers, which include the issuance of cease and desist orders and of orders requiring reinstatement and back pay. 5 U.S.C. § 7118(a)(7).

strike); *National Federation of Federal Employees, Local 1263 v. Defense Language Institute*, 493 F.Supp. 675 (N.D.Cal.1980) (district court lacked jurisdiction to grant plaintiff union an injunction requiring defendants to bargain over the impact of a proposed reduction in force); *Clark v. Mark*, Case No. 79-CV-777 (N.D.N.Y.1980) (district court lacked jurisdiction to grant union injunctive relief requiring employer to enforce the terms of a collective bargaining agreement). We have located no cases which consider whether an action for *damages* of the present sort can be maintained in federal court.

The damages action consists of two components: the suit against the union and the suit against the employer. They are analyzed separately below.

1. *Alleged breach of duty of fair representation by the union.* As the parties have suggested, the key analogy here is the manner in which labor relations are handled in the private sector. The duty of fair representation owed by a union to the members of its bargaining unit has been found in both the NLRA, *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953), and the Railway Labor Act ("RLA"), *Tunstall v. Brotherhood of Locomotive Firemen and Engineermen*, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187 (1944); *Steele v. Louisville & Nashville Railway Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944),—not in any express provision, but implicit in the statutes themselves. *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, n.8, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 66-7 n.2, 101 S.Ct. 1559, 1565-1566 n.2, 67 L.Ed.2d 732 (1981) (Stewart, J., concurring). The cause of action against a union for breach of the duty of fair representation, then, arises under federal law; and the district courts have federal question jurisdiction over such a claim. Similarly, in the Civil Service Reform Act of 1978, there is an implied duty of fair representation owed by a union to all members of the bargaining unit, despite the fact that there is no explicit provision establishing such a duty. Moreover, just as the implicit duty of fair representation gives rise to a cause of action under the NLRA and the RLA despite the otherwise narrowly limited role of the courts under those statutes, the implied duty of fair representation in the Civil Service Reform Act should be enforceable in the district court under 28 U.S.C. § 1331.

This is especially true since one of the primary rationales for allowing such actions under the NLRA and the RLA is equally applicable to actions such as the present one. The rationale is that the administrative boards set up under the various labor acts are more concerned with broad questions of policy than with individuals, so that if individuals are not allowed to enforce the duty of fair representation in court, they may gain no practical benefit from the labor laws. *See Vaca v. Sipes*, *supra*, 386 U.S. at 182-83, 87 S.Ct. at 912-913.

The subordination of the individual's interests to the interest of the group by the administrative board is precisely what has occurred in plaintiff's case. The FLRA settled his unfair practices charge against the union instead of issuing a complaint; and the settlement granted no relief to plaintiff in connection with what FLRA did conclude was an unfair labor practice by the union. The board was concerned only with preventing *future* abuses by the union. Plaintiff, then, lacks an adequate administrative remedy as did the petitioner in *Vaca*

v. Sipes. He should be allowed to seek relief against the union in this court for the same reason that aggrieved employees in the private sector are allowed to sue their unions in federal court for breaches of the duty of fair representation. Accordingly, we hold that there is implicit in the Civil Service Reform Act a duty of fair representation owed by a union to the members of the bargaining unit, and that we have federal question jurisdiction over actions arising from breaches of this duty. Defendants' motion to dismiss the First Cause of Action is therefore denied. Defendant union's alternative motion for summary judgment is likewise denied.

2. *Alleged breach of the collective bargaining agreement by DLI.* Under the NLRA and the RLA, dual-pronged actions are allowed, in which an aggrieved employee sues the union for breach of the duty of fair representation and the employer for breach of the collective bargaining agreement. We have discussed the first prong of such actions above and will now discuss the second.

In NLRA suits, the second prong of the suit has a statutory basis in section 301 of the Act. *Vaca v. Sipes*, *supra*, 386 U.S. at 183-84, 87 S.Ct. at 913-914. There is no parallel provision in the Civil Service Reform Act which would explicitly empower federal courts to hear actions alleging breaches of collective bargaining agreements by federal agencies. Defendants maintain that this lack of specific statutory authority precludes this court from hearing the present action. However, two-pronged actions can also be maintained against unions and employers subject to the RLA, *Glover v. St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 89 S.Ct. 548, 21 L.Ed.2d 519 (1969); *Conley v. Gibson*, 355 U.S. 41, 78

S.Ct. 99, 2 L.Ed.2d 80 (1957); *Bagnall v. Air Line Pilots Association, Int'l*, 626 F.2d 336 (4th Cir. 1980), *cert. denied*, 449 U.S. 1125, 101 S.Ct. 943, 67 L.Ed.2d 112 (1981), despite the fact that the RLA does not contain a provision similar to section 301 of the NLRA. This suggests that the question whether an employee can sue an employer for breach of a collective bargaining agreement negotiated pursuant to the Act does not turn on the existence *vel non* of an explicit statutory provision within the Act, authorizing such an action.

The suit for breach of a collective bargaining agreement brought against an employer subject to the NLRA or the RLA is essentially a common law action for breach of contract. *See Vaca v. Sipes*, *supra*; *Rumbaugh v. Winifrede Railroad Co.*, 331 F.2d 530 (4th Cir. 1964), *cert. denied*, 379 U.S. 929, 85 S.Ct. 322, 13 L.Ed.2d 341 (1964). Thus, we consider whether plaintiff might restate his cause of action as one for ordinary breach of contract against DLI, a federal agency, and so establish federal jurisdiction under 28 U.S.C. § 1346. DLI would argue that since, in general, employees of the federal government hold their positions by appointment rather than by contract, *see, e.g., United States v. Hopkins*, 427 U.S. 123, 96 S.Ct. 2508, 49 L.Ed.2d 361 (1976), no federal emplpyee has a cause of action against a federal employer for breach of a collective bargaining agreement.

While it is true that, traditionally, employment relations in the public sector have not been defined by contract, Congress, through the Civil Service Reform Act, has indicated that the federal government may now enter into collective bargaining agreements with unions which represent federal employees. The effect that this devel-

opment will have upon the manner in which federal employees hold their employment is still uncertain, and is likely to become known only slowly, as the new Act is interpreted, and as the relationships between the new Act and the NLRA and RLA are explored. However, it is clear, at the very least, that a collective bargaining agreement under the Act is an agreement between a federal agency and a union similar to the agreements between private employers and unions under the NLRA and the RLA.

When a union representing private sector employees breaches its duty of fair representation, "individual union members may sue their employers . . . for breach of a promise embedded in the collective-bargaining agreement that was intended to confer a benefit upon the individual." *Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 298-99, 91 S.Ct. 1909, 1923-1924, 29 L.Ed.2d 473 (1971). The determination as to whether the parties intended to confer such a benefit upon the individual is to be made by reading the collective bargaining agreement in light of "the common law of a particular industry or of a particular plant," *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579, 80 S.Ct. 1347, 1351, 4 L.Ed.2d 1409 (1960). Our task, then, narrowly defined, is to determine whether Congress could have intended collective bargaining agreements between federal agencies and unions to confer benefits upon federal employees in the same way that collective bargaining agreements in the private sector confer benefits upon the employees of private employers.

We do not suggest that the relationship between a federal employer and its employees becomes a "contractual"

one in all respects by virtue of the negotiation of a collective bargaining agreement. Federal employers have traditionally had wide discretion in matters of employment relations for reasons of public policy. This discretion has been manifest in the freedom of the federal employer from contractual restraints upon relations with employees. However, it would be incongruous to suggest that Congress intended the Civil Service Reform Act to have no effect on the traditional structure of labor relations in the federal sector. When a federal agency becomes a party to a collective bargaining agreement, it, no less than its counterpart in the private sector, helps to create a code defining the rights and duties of the parties. Insofar as the collective bargaining agreement elicits from the federal agency promises which are "intended to confer a benefit upon the individual," *Amalgamated Ass'n etc. v. Lockridge, supra*, 403 U.S. at 299, 91 S.Ct. at 1924, those promises should be binding upon the federal agency just as they would be on a private employer.

When the courts are called upon to determine whether a benefit has been conferred upon a federal employee by a collective bargaining agreement, any ambiguity in the agreement is likely to be construed in light of the preference for granting federal agencies wide discretion in matters of employment. This preference for discretion must necessarily form a part of the "common law" of the federal agency. But, given this limitation upon the benefits likely to be conferred upon federal employees, we are unwilling to state that a collective bargaining agreement between a federal employer and a union can never confer a benefit upon an individual employee.

That being said, however, we find that the action by this plaintiff against his employer cannot be maintained. If it is to be entertained by this court, it must be brought

under 28 U.S.C. § 1346, subject to the limitations of that statute. Plaintiff has only alleged federal question jurisdiction, which is inapplicable to actions for breach of contract against the federal government. Accordingly, the Second Cause of Action must be dismissed, with leave to amend, for lack of subject matter jurisdiction.[6]

II. *Constitutional Claims*

As noted above, plaintiff alleges constitutional violations by DLI. Specifically, the Third Cause of Action alleges that, by arbitrating Kuntelos' grievance without affording plaintiff notice and a hearing, DLI deprived plaintiff of property without due process of law, in violation of the fifth and fourtheenth amendments. The Fourth Cause of Action alleges that the collective bargaining agreement, as applied by DLI, violates the equal protection clause of the fourteenth amendment by denying arbitration to employees who cannot be represented at arbitration by their union and by effectively denying collective bargaining representation to such employees.

[6] If plaintiff chooses to amend his complaint, he should indicate the amount of the damages he is requesting, so tht we can determine whether this case falls within the jurisdictional amount requirement inposed upon us by 28 U.S.C. § 1246. If the action is for an amount greater than $10,000, we lack jurisdiction over it. The Court of Claims would, however, have jurisdiction. The fact that plaintiff would not be able to proceed against the union in the Court of Claims should not preclude the Court of Claims from hearing the breach of contract claim against the federal agency. *Cf. Clayton v. ITT Gilfillan*, 623 F.2d 563 (9th Cir.1980), *aff'd in part, rev'd in part sub nom Clayton v. International Union, United Automobile, etc.*, 451 U.S. 679, 101 S.Ct. 2088, 68 L.Ed.2d 538 (1981); *Smart v. Ellis Trucking Co., Inc.*, 580 F.2d 215 (6th Cir.1978), *cert. denied*, 440 U.S. 958, 99 S.Ct. 1497, 59 L.Ed.2d 770 (1979). Of course, in order to prevail in such an action before the Court of Claims, plaintiff would still need to prove that the nonparty union breached its duty of fair representation, as a predicate to establishing DLI's alleged liability for breach of the collective bargaining agreement.

The two fourteenth amendment claims must be dismissed. The fourteenth amendment only covers *state* action, and has no applicability in an action, like the present one, against a *federal* entity. Thus, of the constitutional claims, there remains for consideration only the action brought under the fifth amendment due process clause.

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the . . . protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). Plaintiff alleges that he had a property interest in the course developer position which entitled him to certain procedural guarantees. In order to establish such a property interest, plaintiff must establish that he had a "legitimate claim of entitlement" to the position, and not merely an "abstract need or desire" for the position, or a "unilateral expectation" of it. *Board of Regents v. Roth, supra*, 408 U.S. at 577, 92 S.Ct. at 577. *See also Perry v. Sindermann*, 408 U.S. 593, 602-03, 92 S.Ct. 2694, 2700, 33 L.Ed.2d 570 (1972). Plaintiff alleges that his property right arises from the fact that he could be removed from the course developer position only for just cause.

Federal employees can be removed only for cause if they are either in the "competitive service," or are in the "excepted" (noncompetitive) service but are "preference eligible"—i.e., Veterans. 5 U.S.C. § 7511(a)(1)(A)-(B); § 7513. Plaintiff was not covered by either of these provisions. Pursuant to 5 C.F.R. 213.3107(a), the positions of course developer and language instructor are excepted from the competitive service. As a non-Veteran in the excepted service, plaintiff was not entitled to procedural

guarantees under the statute. *Cf. Paige v. Harris*, 584 F.2d 178, 181 (7th Cir.1978). Thus, in order to show that he was entitled to such guarantees, he must prove that the guarantees were established by, or otherwise binding upon, his employing agency. *Board of Regents v. Roth*, *supra*; *Colm v. Vance*, 567 F.2d 1125, 1127-28 (D.C.Cir. 1977).

Plaintiff contends that the collective bargaining agreement, which is binding upon DLI, provides that he cannot be dismissed without just cause. If that were true, it would give rise to a property right. However, it appears that plaintiff has misconstrued the collective bargaining agreement. The agreement provides that "*[f]ormal disciplinary actions* include written reprimands, suspensions, demotions, and removals, and *will be taken only for just cause.*" Article XVI, § 2B of the May 5, 1976 collective bargaining agreement (emphasis added). See also Article XXII of the May 15, 1978 collective bargaining agreement. The reduction of plaintiff's grade from GS-11 to GS-9 was not a disciplinary action. Thus, the reduction in grade was not governed by the "just cause" provision of the collective bargaining agreement, which, by its terms, is applicable only to disciplinary actions. Instead, it appears to be governed by 5 U.S.C. § 7106(a)(2)(A), which, in relevant part, indicates that ". . . nothing in this chapter shall affect the authority of any management official of any agency . . . (2) in accordance with applicable laws—(A) to hire, assign, direct, layoff and retain employees in the agency . . ."

Plaintiff correctly asserts that, even if the explicit language of the applicable rules, regulations, and collective bargaining agreement provisions do not create a constitutionally protected property interest, a property interest

may arise from "understandings, promulgated or fostered by . . . officials, that may justify . . . [a] legitimate claim of entitlement to continued employment absent 'sufficient cause.'" *Perry v. Sindermann*, *supra*, 408 U.S. at 602-03, 92 S.Ct. at 2700. He has alleged that such understandings exist. His complaint is thus adequate to withstand DLI's motion to dismiss.[7]

However, we are in agreement with DLI's contention that the sovereign immunity doctrine bars plaintiff's recovery of damages other than lost wages for the alleged violation of due process.[8]

> It long has been established, of course, that the United States, as sovereign, "is immune from suit

[7] We would note, however, that in order to prevail in later stages of this action, plaintiff would have to present some concrete basis for his understanding that he could not be demoted without just cause in the present, nondisciplinary context. "[A] legitimate claim of entitlement must derive from some reasonably identifiable source apart from the mere expectancy or desire of the claimant." *Colm v. Vance*, *supra*, 567 F.2d at 1129. *See also Perry v. Sindermann*, *supra*; *Sims v. Fox*, 505 F.2d 857, 861-62 (5th Cir.1974), *cert. denied*, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 678 (1975). Moreover, although "[a]n entitlement may spring from an understanding, . . . the understanding must be 'mutually explicit.'" *Bollow v. Federal Reserve Bank*, 650 F.2d 1093, 1099 (9th Cir.1981), quoting *Board of Regents v. Roth*, *supra*, 408 U.S. at 577, 92 S.Ct. at 2709.

[8] Our decision to this effect is not inconsistent with *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979). There, the Supreme Court held that the doctrine of sovereign immunity does not bar an action for damages against federal officials in their individual capacity for violation of the constitutional right to due process under the fifth amendment. It did not hold that sovereign immunity is waived where relief will come from the sovereign itself, as in the present action. *See Beller v. Middendorf*, 632 F.2d 788, 798 n.5 (9th Cir.1980), *cert. denied sub nom Beller v. Lehman*, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1981) and *Miller v. Weinberger*, ____ U.S. ____, 102 S.Ct. 304, 70 L.Ed.2d 150 (1981).

> save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. [584], at 586, 61 S.Ct. 767, 85 L.Ed. 1058. And it has been said, in a Court of Claims context, that a waiver of the traditional sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. King*, 395 U.S. [1] at 4 [89 S.Ct. 1501, 23 L.Ed.2d 52].

United States v. Testan, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976). Plaintiff has suggested no meritorious theory upon which we can hold that the United States has agreed to pay all damages resulting from constitutional torts of this nature.

First, he contends that the United States waived sovereign immunity through the passage of the Civil Service Reform Act, which subjects the federal government to damages liability. However, as plaintiff's cause of action for due process violations was brought under the constitution and not under the Civil Service Reform Act, it is immaterial for purposes of the present discussion whether sovereign immunity has been waived as to actions brought under the Act. The question is whether sovereign immunity has been waived as to constitutional torts such as the one alleged by plaintiff.

Plaintiff next contends that sovereign immunity has been generally waived by the Tucker Act, 28 U.S.C. § 1346, which grants the district courts and the Court of Claims jurisdiction over claims against the United States based upon violation of the United States Constitution, statutes, or regulations. Since plaintiff is alleging a constitutional violation, he maintains that damages may be awarded under the Tucker Act. However, the Tucker Act

is the statute which the Supreme Court was discussing in *Testan* when it held that a statute which is purely jurisdictional does not waive sovereign immunity. Such a statute only ensures the litigant that a claim of the variety enumerated may be pursued in the appropriate federal forum. A different statute must be looked to for the substantive right to collect money damages. There is no such statute generally waiving sovereign immunity as to money damages arising from a fifth amendment due process violation. *Cf. Conservative Caucus, Inc. v. United States*, 650 F.2d 1206, 1211-12 (Ct.Cl.1981); *Alabama Hospital Ass'n v. United States*, 656 F.2d 606 (Ct.Cl.1981); *Carruth v. United States*, 627 F.2d 1068 (Ct.Cl.1980); *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007-09 (Ct.Cl.1967).

Third, plaintiff contends that the Back Pay Act, 5 U.S.C. § 5596, "creates a cause of action for money damages arising from adverse personnel actions taken by the federal government against its employees." Plaintiff's Opposition to Defendants' Motions to Dismiss, at 30. In fact, the Back Pay Act only authorizes "*retroactive recovery of wages* whenever a federal employee has 'undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of' the compensation to which the employee is otherwise entitled." *United States v. Testan*, *supra*, 424 U.S. at 405, 96 S.Ct. at 957 (emphasis added). Thus, plaintiff, if he prevails against DLI on his constitutional claim, may recover only back pay, and not general compensatory damages of the variety which he has requested in connection with his Third Cause of Action. Accordingly, DLI's motion respecting the question of damages is granted to the extent just indicated.

In summary, we have denied defendants' motion to dismiss plaintiff's claim against the union for breach of the duty of fair representation. We have federal question jurisdiction over that claim. We have granted, with leave to amend, defendants' motion to dismiss plaintiff's claim against DLI for breach of the collective bargaining agreement. We lack federal question jurisdiction over that claim. Plaintiff may, however, file an amended complaint restating the claim as a cause of action for breach of contract against a federal agency under 28 U.S.C. § 1346, subject to the jurisdictional amount requirements of that statute.

As to the constitutional claims, we have dismissed those which were brought under the fourteenth amendment. We have denied DLI's motion to dismiss the fifth amendment due process claim, as plaintiff has sufficiently alleged a property interest arising from understandings promulgated by DLI officials. However, if plaintiff prevails on this claim, he may recover only back pay, as sovereign immunity bars the recovery of general compensatory damages in an action of this nature.

SO ORDERED.

(Karahalios II)

Efthimios A. KARAHALIOS, Plaintiff,

v.

DEFENSE LANGUAGE INSTITUTE FOREIGN LANGUAGE CENTER PRESIDIO OF MONTEREY, and Local 1263, National Federation of Federal Employees, Defendants.

No. C-81-2745 RFP.

United States District Court,
N. D. California

July 23, 1982

Thomas R. Duffy, Monterey, Cal., for plaintiff.

Deborah Seymour, Asst. U.S. Atty., San Francisco, Cal., Paul Blankenstein and Mark Chavez, Dept. of Justice, Washington, D.C., for defendants.

MEMORANDUM AND ORDER

PECKHAM, Chief Judge.

Pendent Jurisdiction

In our order dated March 9, 1982, 534 F.Supp. 1202, we ruled that we have federal question jurisdiction over plaintiff's claim that defendant union breached its duty of fair representation. As to the claim against the Defense

Language Institute ("DLI") for breach of the collective bargaining agreement, however, we indicated that, as it was essentially a claim for breach of contract against the government, it fell within the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491, so that we lacked jurisdiction over it if it were a claim for over $10,000.

Apparently, plaintiff's claim against DLI is for an amount greater than $10,000. Accordingly, we lack jurisdiction over that claim. However, plaintiff now asks that we assume pendent jurisdiction over the claim so that it can be resolved in the same forum as the claim for breach of the duty of fair representation. Although we recognize that it might be more efficient to try both claims in the same forum, we must deny plaintiff's motion. The United States has not consented to be sued in the district court when a contract claim is for more than $10,000 in damages. "This court cannot, by using the judge-made doctrine of pendent jurisdiction, waive the immunity of the United States where Congress, the constitutional guardian of this immunity, has declined to do so." *Sanborn v. United States*, 453 F.Supp. 651, 655 (E.D.Cal.1977). *See also Ware v. United States*, 626 F.2d 1278, 1285-87 (5th Cir.1980); *Lenoir v. Porters Creek Watershed District*, 586 F.2d 1081, 1087-88 (6th Cir.1978).

Plaintiff fears that the damages issues will be unduly fragmented if the two claims are heard in separate forums. In the typical labor damages action brought by a federal employee, plaintiff's fears would be largely unfounded. Because of the manner in which damages are apportioned between the employer and the union in such cases, the employer generally pays the larger share of any damages which are awarded. A union which is found liable for breach of the duty of fair representation rarely

pays more than a *de minimis* amount in damages. *See Vaca v. Sipes*, 386 U.S. 171, 196-98, 87 S.Ct. 903, 919-921, 17 L.Ed.2d 842 (1967); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48-50, 99 S.Ct. 2121, 2125-2126, 60 L.Ed.2d 698 (1979). For that reason, a federal employee might reasonably choose to proceed in the Court of Claims alone, pursuing only the claim against the federal employer, with the thought that bringing a separate action against the union in the district court would not be sufficiently productive to justify the expense of the litigation.[1] Thus, once the format of these lawsuits by federal employees becomes established, the fragmentation to which plaintiff refers is likely to be minimized.

In any event, as noted above, we must deny plaintiff's motion on the ground that we lack jurisdiction over his claim against his employer.

Reconsideration

Through its opposition to plaintiff's motion requesting that this court assume pendent jurisdiction over the breach of collective bargaining agreement claim, the DLI has, in effect, asked us to reconsider our March 9, 1982

[1] Of course, in deciding the question of the federal employer's liability, the Court of Claims would first have to determine whether the non-party union had breached its duty of fair representation. *Cf. Clayton v. ITT Gilfillan*, 623 F.2d 563 (9th Cir.1980), *aff'd in part, rev'd in part sub nom Clayton v. International Union, United Automobile, etc.*, 451 U.S. 679, 101 S.Ct. 2088, 68 L.Ed.2d 538 (1981); *Smart v. Ellis Trucking Co., Inc.*, 580 F.2d 215 (6th Cir.1978), *cert. denied*, 440 U.S. 958, 99 S.Ct. 1497, 59 L.Ed.2d 770 (1979). The Court of Claims would determine this only as a preliminary question. It would not be empowered to require the union to pay damages to the plaintiff, since the union would not be a party to the action. The Court of Claims would, of course, be able to award damages against the federal employer.

ruling that the federal courts have jurisdiction over damages actions brought by federal employees against their unions and their employers. We will construe the DLI's opposition as a formal motion for reconsideration.

In support of its position, the DLI cites *Columbia Power Trades Council v. United States Department of Energy*, 671 F.2d 325 (9th Cir.1982), an opinion which was issued a few days after our March 9 order. There, the plaintiff union sued for declaratory and injunctive relief, seeking a writ of mandamus directing the Bonneville Power Administration to implement an arbitrator's award of a wage increase. The Ninth Circuit held that the district court was without jurisdiction to hear the case since, by the terms of Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. § 7101 *et seq.* ("the Act"), the Federal Labor Relations Authority ("the Authority") had exclusive jurisdiction over the matter. Although the Ninth Circuit opinion contains broad language to the effect that the federal courts have no jurisdiction over federal labor relations matters, it does not squarely face the question whether the federal courts have jurisdiction over *damages* actions brought under the Act. As in virtually all of the cases decided under the Act up to the present time, the question before the court in *Columbia Power Trades Council* was whether the Act empowers the district courts to grant *injunctive* relief.[2] The courts which have considered that question have all properly

[2] *See also United States v. Professional Air Traffic Controllers Organization (PATCO)*, 653 F.2d 1134 (7th Cir.1981), *cert. denied*, 454 U.S. 1083, 102 S.Ct. 639, 70 L.Ed.2d 617 (1981); *National Federation of Federal Employees, Local 1263 v. Defense Language Institute*, 493 F.Supp. 675 (N.D.Cal.1980); *Clark v. Mark*, Case No. 69-CV-777 (N.D.N.Y.1980).

concluded that the district courts lack such authority. However, for the reasons expressed in our earlier opinion, we are still persuaded that the federal courts lack jurisdiction over damages actions brought by federal employees against their unions and their employers.

The duty of a union fairly to represent all members of the bargaining unit is inherent in the Act, just as it is inherent in both the National Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.*, and the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* As the Supreme Court has noted,

> "Because '[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit, *Vaca v. Sipes*, 386 U.S. 171, 182 [87 S.Ct. 903, 912, 17 L.Ed.2d 842] (1967), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, 'the responsibility and duty of fair representation.' *Humphrey v. Moore*, [375 U.S. 335,] . . . 342 [84 S.Ct. 363, 368, 11 L.Ed.2d 370]. The union as the statutory representative of the employees is 'subject always to complete good faith and honesty of purpose in the exercise of its discretion.' *Ford Motor Co. v. Huffman*, [345 U.S. 330,] . . . 338 [73 S.Ct. 681, 686, 97 L.Ed. 1048]." That this duty of fair representation under the NLRA may be judicially enforced was made clear in *Vaca v. Sipes*, 386 U.S. 171 [87 S.Ct. 903, 17 L.Ed.2d 842].

United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 67 n.2, 101 S.Ct. 1559, 1562 n.2, 67 L.Ed.2d 732 (1981),

quoting *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564, 96 S.Ct. 1048, 1056, 47 L.Ed.2d 231 (1976). Thus, there was no need for Congress to write into the Civil Service Reform Act of 1978 a section specifically conferring upon the district courts the jurisdiction to hear breach of duty of fair representation cases brought by federal employees. The district courts already have jurisdiction under 28 U.S.C. §§ 1331 to hear claims that the duty of fair representation, which duty arises out of the Act, has been breached.

Plaintiff's claim that his federal employer breached the collective bargaining agreement likewise has "its own discrete jurisdictional base." *United Parcel Service v. Mitchell, supra*, 451 U.S. at 66, 101 S.Ct. at 1566. Such a claim is, in essence, one for breach of contract. *See Vaca v. Sipes, supra*, 386 U.S. at 183-84, 87 S.Ct. at 913. Since, in a non-diversity action, the federal courts lack jurisdiction over contract claims against private parties, Congress needed to create a specific jurisdictional grant whereby private sector employees could sue their employers for breaching a collective bargaining agreement. Congress did so in § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. In contrast, when Congress enacted Title VII of the Civil Service Reform Act of 1978, there was no need to create a new jurisdictional base in order to empower the federal courts to hear breach of collective bargaining agreement claims against federal employers. Under the Tucker Act, the federal courts already have jurisdiction over contract claims against the federal government. As noted in our earlier opinion, the federal courts are thus empowered to entertain claims such as the one plaintiff has brought against the DLI—although the proper forum in the instant case is the Court of Claims and not the district court.

Citing *Yates v. United Soldiers' and Airmen's Home*, 533 F.Supp. 461 (D.D.C.1982), however, the DLI argues that the legislative history of the Act indicates that Congress intended to withhold jurisdiction over damages actions from the federal courts. In *Yates*, the district court held that the federal courts do lack such jurisdiction. In support of its holding, the district court noted that an early version of § 7121(c) of the Act was deleted from the final version of the statute. The deleted passage would have authorized any party to a collective bargaining agreement to seek enforcement of grievance or arbitration provisions in federal court. *See* H.R.Rep.No.1403, 95th Cong., 2d Sess. 286 (1978). In *Yates*, the court interpreted the deletion as evidence that Congress did not intend for the district courts to have jurisdiction over any federal labor relations matters. However, we believe that the deletion of the passage indicates only that Congress did not intend the district courts to have jurisdiction to grant *injunctive relief* under the Act. The deletion of the injunctive relief provision does not indicate any intent by Congress to deprive federal courts of jurisdiction to hear damages claims under the Act.

Nonetheless, the DLI argues that if we assume jurisdiction over damages actions, federal employees will simply convert every labor dispute into a damages action in order to bring suit in federal court. This, the DLI asserts, would defeat the purpose of the preemption of labor disputes by labor boards, which is to "shield the system from conflicting regulation of conduct." *Amalgamated Ass'n of Street, etc. v. Lockridge*, 403 U.S. 274, 292, 91 S.Ct. 1909, 1920, 29 L.Ed.2d 473 (1971). That argument is without merit in the present context. Damages actions are a recognized exception to the rule that

jurisdiction over labor disputes should be vested exclusively in a labor board in order to avoid conflicting regulation. As the Supreme Court noted in *Vaca v. Sipes,*

> A primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation. The doctrine was judicially developed in *Steele* [*v. Louisville & N.R.Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944)] and its progeny, and suits alleging breach of the duty remained judicially cognizable long after the NLRB was given unfair labor practice jurisdiction over union activities by the L.M.R.A. Moreover, when the Board declared in *Miranda Fuel* [*Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (C.A. 2d Cir. 1963)] that a union's breach of its duty of fair representation would henceforth be treated as an unfair labor practice, the Board adopted and applied the doctrine as it had been developed by the federal courts. *See* 140 N.L.R.B., at 184-86. Finally, as the dissenting Board members in *Miranda Fuel* have pointed out, fair representation duty suits often require review of the substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and in its handling of the grievance machinery; as these matters are not normally within the Board's unfair labor practice jurisdiction, it can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts, which have been engaged in this type of review since the *Steele* decision.

Vaca v. Sipes, supra, 386 U.S. 180-181, 87 S.Ct. 911-912 (footnotes omitted). In the emerging field of public sector labor law, too, maximum consistency of regulation will be achieved if damages actions are heard by the federal courts, which have acquired considerable expertise in handling such cases during the period of nearly forty years in which they have entertained private sector breach of duty of fair representation actions.

The DLI goes on to argue that the federal courts' jurisdiction is superseded by the fact that the General Counsel of the Authority has unreviewable discretion to determine whether a formal complaint should be issued against a union or an employer charged by an employee with unfair labor practices. In the present case, the General Counsel refused to issue a complaint against the DLI. It did decide to issue a complaint against the union, provided that no settlement was entered into. Because the union subsequently did settle with the Authority—in an agreement which afforded no relief to plaintiff as an individual, but which instead established certain guidelines designed to prevent future abuses—no complaint was ever issued against the union by the General Counsel. The DLI argues that the unreviewable discretion of the General Counsel not to issue any complaint in the instant case strips this court of jurisdiction. We disagree.

In the context of private sector labor relations, the General Counsel of the National Labor Relations Board, like the General Counsel of the Federal Labor Relations Authority, has unreviewable discretion to decide whether to issue a complaint against a union or an employer. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-139, 95 S.Ct. 1504, 1510-1511, 44 L.Ed.2d 29 (1975); *Vaca v.*

Sipes, supra, 386 U.S. at 182, 87 S.Ct. at 912. However, that fact does not preclude an employee in the private sector from bringing a damages action against the union and the employer. Indeed, the fact that the General Counsel of the National Labor Relations Board has unlimited discretion to refuse to issue a complaint is precisely why there is a need for a damages remedy against the union and the employer. The Supreme Court made this abundantly clear in *Vaca v. Sipes*:

> The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit. *See, e.g., J. I. Case Co. v. Labor Board*, 321 U.S. 332 [64 S.Ct. 576, 88 L.Ed. 762]. This Court recognized in *Steele* that the congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination. 323 U.S., at 198-99 [65 S.Ct., at 230]. Since that landmark decision, the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law. Were we to hold, as petitioners and the Government urge, that the courts are foreclosed . . . from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint. *See United Electrical Contractors Assn. v. Ordman*, 366 F.2d 776, cert. denied, 385 U.S. 1026 [87 S.Ct. 753, 17 L.Ed.2d 674]. The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine.

Vaca v. Sipes, supra, 386 U.S. at 182-83, 87 S.Ct. at 912-913 (footnote omitted). Just as in the context of private sector labor relations, then, we must provide federal employees with some means of redressing their grievances against their unions and employers since these employees, their interests subordinated to the interests of the group, are subject to unreviewable decisions by the Authority not to prosecute their grievances.

For the foregoing reasons, the DLI's request that we reconsider our previous decision is hereby denied.

SO ORDERED.

(Karahalios III)

Efthimios A. KARAHALIOS, Plaintiff,

v.

DEFENSE LANGUAGE INSTITUTE FOREIGN LANGUAGE CENTER PRESIDIO OF MONTEREY, and Local 1263, National Federation of Federal Employees, Defendants.

No. C-81-2745 RFP.

United States District Court,
N. D. California
Dec. 31, 1984

Thomas R. Duffy, Richard DeStefano, Duffy & Milgrom, Monterey, Cal., for plaintiff.

William T. McGivern, Asst. U.S. Atty., San Francisco, Cal., Hermes Fernandez, U.S. Dept. of Justice, Washington, D.C., for defendant Defense Language Institute.

Saul M. Weingarten, Saul M. Weingarten, Inc., Seaside, Cal., Patrick J. Riley, Nat. Federation of Federal Employees, Washington, D.C., for defendant Local 1263, Nat. Federation of Federal Employees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PECKHAM, Chief Judge.

I. INTRODUCTION

The plaintiff in this case, Efthimios Karahalios, has for many years been a teacher at the Defense Language Institute (hereinafter "DLI") in Monterey, California.[1]

[1] DLI is a federal agency that provides foreign language instruction to United States military and civilian personnel.

Like the other teachers at DLI, he is within a bargaining unit for which Local 1263 of the National Federation of Federal Employees (hereinafter "the Union") is the exclusive bargaining representative. He is not a Union member, however, and he is not satisfied with the representation he has received from the Union. Specifically, he brought this lawsuit against the Union in 1981, alleging that the Union had mishandled grievances relating to his employment status at DLI, and had thereby breached the duty of fair representation that it owed to him.

He also named DLI as a defendant in his suit, asserting that DLI had refused to arbitrate a grievance he had filed. He maintained that such action constituted a breach of DLI's obligations under its collective bargaining agreements[2] and a violation of his rights to due process and equal protection of the law. The court disagreed with those claims, however, dismissing the equal protection claim and granting summary judgment on the remaining claims against DLI.

But the court declined to grant summary judgment for the Union on plaintiff's claim against it. Thus, that claim proceeded to trial before the court on June 20, 1984. The trial lasted two days, and, at its conclusion, the court took the case under submission for consideration and decision. Having since carefully reviewed the evidence presented and the relevant case law, the court now enters its findings of fact and conclusions of law as set forth below.

II. FINDINGS OF FACT

This dispute arose in 1976, when DLI opened a course developer position in its Greek Department. Two instruc-

[2] DLI and the Union were signatories to collective bargaining agreements dated May 5, 1976 and May 15, 1978.

tors in the Greek Department at DLI sought that position: plaintiff and a man named Simon Kuntelos. For both men, the possibility of being promoted from instructor (pay grade GS-9) to course developer (pay grade GS-11) represented a chance for a substantial increase in pay and prestige.

Both plaintiff and Mr. Kuntelos were well-qualified for the course developer position. Plaintiff had never held the title of course developer, but he had performed course development duties during his long tenure at DLI, and his work had been highly praised. Mr. Kuntelos, in contrast, had previously served as a course developer for DLI for a number of years. He had, however, been demoted to instructor in 1971 when DLI instituted an organizational change eliminating his course developer position.

Upon learning in 1976 that DLI had reopened the Greek Department course developer position, Mr. Kuntelos believed that he was entitled to noncompetitive consideration for that post. DLI did accord him such consideration, but decided not to award him a noncompetitive promotion. It therefore informed Mr. Kuntelos that he could obtain further consideration for the job only by going through DLI's competitive selection procedures, which included a written essay test. Mr. Kuntelos responded to DLI'S decision by refusing to participate in the competitive selection procedures. Consequently, DLI gave him no additional consideration in the hiring process, and, early in 1977, it awarded the course developer position to the only person who went through the competitive selection process: Mr. Karahalios.

Although Mr. Kuntelos did not attempt to secure the course developer position through participation in the

competitive selection process, he did file a grievance against DLI regarding his nonpromotion. In that grievance, he alleged that DLI had not given him proper noncompetitive consideration.

The Union represented Mr. Kuntelos through the first three stages of DLI's grievance procedure, but was unsuccessful in persuading DLI that Mr. Kuntelos' grievance was meritorious. The next and final step in the grievance procedure was arbitration, a step that could be taken only upon approval of the Union.

To Mr. Kuntelos' satisfaction, the Union decided to request arbitration of his grievance.[3] In making that decision, however, the Union did not seriously consider the relative qualifications of Mr. Kuntelos and Mr. Karahalios,[4] or the effect that arbitration might have on Mr. Karahalios' employment status. It neither consulted Mr. Karahalios regarding his course developer qualifica-

[3] Certain evidence in the record arguably suggests that the Union's decision was based on a bad faith policy of favoring Union supporters over other bargaining unit members. Specifically, such an inference could be drawn from Mr. Kuntelos' status as a Union official versus plaintiff's lack of Union membership, Mr. Kuntelos' offer to donate money to the Union if he prevailed in arbitration, and the Union's history of chastising DLI for failing to promote more Union employees (see Plaintiff's Exhibit 42). It is the court's opinion, however, that it need not decide whether to draw that unfavorable inference.

[4] The Union's president, Rogelio Castro, testified that when the Union officials met to consider arbitration of Mr. Kuntelos' grievance, they discussed the number of years that plaintiff had worked, as well as plaintiff's failure to hold the title of course developer prior to his 1977 selection for that post. But such discussion, assuming it took place, hardly constituted a meaningful examination of plaintiff's credentials, especially because it was not based on information, obtained from plaintiff or his personnel file. Moreover, Mr. Castro's testimony before the court was, on the whole, vague and marked by inconsistencies. The court is therefore satisfied that whatever discussion of Mr. Karhalios' qualifications occurred at the Union meeting was minimal and insignificant.

tions, nor determined his qualifications through an examination of his personnel file. Indeed, it did not even inform Mr. Karahalios that Mr. Kuntelos had filed a grievance.

Mr. Kuntelos' grievance went to arbitration before Alvin J. Goldman on June 22, 1977. The Union did not notify plaintiff of the arbitration hearing, and plaintiff did not learn of the hearing until well after it was over. Thus, plaintiff had no opportunity to present his views to the arbitrator.

Arbitrator Goldman rendered his decision on August 4, 1977. He ruled in favor of Mr. Kuntelos, finding that Mr. Kuntelos had not received proper noncompetitive consideration. To remedy that error, he ordered DLI to reconstitute the course developer selection process in accordance with certain guidelines.[5]

Thereafter, DLI gave Mr. Kuntelos another opportunity to take the written essay test that plaintiff had taken. Prior to administering the test, DLI informed Mr. Kuntelos that it would refer him to the selecting official as a repromotion eligible if he obtained a score of 85 or better.

Although the essay test that Mr. Kuntelos took was the same in content as the one that Mr. Karahalios had taken, DLI's testing procedure was different. Whereas Mr. Karahalios had only been given two hours to complete the test, Mr. Kuntelos was given a full three-and-one-half hours. Further, the tests of the two competitors were graded almost a year apart, and, because each man took the test at a time when no others were taking it, the

[5] For the specifics of Arbitrator Goldman's award, see his opinion, which is filed as Plaintiff's Exhibit 3.

graders were aware of whose exam they were grading. Most significantly, however, Mr. Karahalios was not afforded an opportunity to take the exam at the same time and under the same conditions as Mr. Kuntelos.

The graders gave Mr. Kuntelos a score of 83, and Mr. Karahalios a score of 81. Thus, DLI did not refer Mr. Kuntelos to the selecting official as a repromotion. Instead, it referred both Mr. Kuntelos and Mr. Karahalios for competitive evaluation.

The selecting official, Alex Szaszy, considered both candidates and chose Mr. Kuntelos. Accordingly, even though plaintiff had performed satisfactorily in the course developer position for approximately one year, DLI demoted him to the rank of instructor effective May 7, 1978.

Plaintiff then filed two grievances against DLI, one in May of 1978 and one in October of that year. His grievances were lengthy, detailed, and based on numerous grounds. *See* Plaintiff's Exhibits 6 & 7. But one of his major arguments was that DLI should invalidate his demotion because it had used improper testing procedures in selecting Mr. Kuntelos.

Mario Iglesias acted as union representative for plaintiff during the first three stages of the grievance process. Mr. Iglesias believed that plaintiff's grievances were meritorious, yet he was unable to convince DLI of that. On December 20, 1978, DLI completed the third stage of the grievance procedure by denying both of plaintiff's grievances.

Plaintiff then asked the Union to take his grievances to arbitration, and the Union officials met to consider his request. The minutes of that meeting have disappeared, so the details of what transpired are not entirely

clear. It is undisputed, however, that the Union rejected plaintiff's request.[6]

From the testimony at trial, it further appears that the Union did not base its decision on a discussion of the merits of plaintiff's grievances. Rather, it seems to have relied solely on a letter from its counsel advising that arbitrating on plaintiff's behalf would constitute an untenable conflict of interest due to the earlier arbitration for Mr. Kuntelos.[7] Admittedly, the testimony on this point was hardly unambiguous. But the court is confidant [*sic*] that Mr. Iglesias was correct in his assertion that the meeting did not include a discussion of plaintiff's complaints about the testing procedures. The court is also convinced that Mr. Iglesias was not asked to, and consequently did not, describe or comment on the merits of plaintiff's grievances at the meeting. Given the centrality of the testing procedures to plaintiff's grievances, as well as Mr. Iglesias' familiarity with the grievances through his role as plaintiff's representative in the grievance process, those omissions strongly suggest that the Union did not consider the merits of plaintiff's grievances at its meeting. The court therefore finds that the Union's decision regarding arbitration of plaintiff's grievances was grounded on reasons unrelated to the merits of plaintiff's claims.[8]

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[6] Despite Mr. Iglesias' earlier conviction that plaintiff's grievances had merit, the Union's decision was unanimous. Mr. Iglesias testified at trial that he voted against plaintiff in deference to the judgment of the Union's counsel to the advisability of arbitration.

[7] The Union could have remedied the conflict of interest problem by appointing independent counsel for plaintiff to take plaintiff's grievances to arbitration. But it did not do so, even though plaintiff and the Union's counsel had suggested that course.

[8] The court is fully aware that this finding is inconsistent with the representations made in Plaintiff's Exhibit 9, a letter to plaintiff in which the Union's president, Mr. Castro, stated that the Union's decision was based in part on an assessment of the merits of plaintiff's grievances.

After plaintiff discovered that the Union would not take his grievances to arbitration, he attempted to obtain an arbitration without the assistance of the Union. But DLI refused to arbitrate, maintaining that it was only compelled to arbitrate upon receiving a request from the Union.

Plaintiff then sought relief against DLI and the Union from the Federal Labor Relations Authority (hereinafter "FLRA"). He charged that DLI had breached its contract obligations when it failed to arbitrate with him, and the Union had breached its duty of fair representation when it refused to request arbitration of his grievances.

The Regional Director of the FLRA disagreed with both of plaintiff's charges. Plaintiff appealed that decision to the General Counsel, however, and the General Counsel overturned the Regional Director's ruling on the charge against the Union. The General Counsel specifically held that the Union had denied arbitration for reasons unrelated to the merits of plaintiff's grievances, and had thus breached its obligation to represent plaintiff fairly. The General Counsel further ordered the case remanded to the Regional Director for issuance of a complaint, absent settlement.

The remand did not result in relief for plaintiff, however. Rather, the Union entered into a settlement agreement with the FLRA, which simply provided that the Union would post the following notice:

> WE HEREBY NOTIFY OUR MEMBERS THAT:
>
> WE WILL NOT inform employees that where two or more employees are seeking one position, the Union, the National Federation of Federal Employees, Local 1263, cannot represent all such employees in the contractual grievance procedure.

> WE WILL NOT inform employees that it would be a conflict of interest for the Union, the National Federation of Federal Employees, Local 1263, to represent all such employees.
>
> WE WILL NOT in any like or related manner interfere with, restrain or coerce any employees in the exercise of their rights under the Statute.

Plaintiff protested against the settlement, but was unsuccessful in doing so.

Plaintiff then resorted to filing the instant lawsuit. Even before he brought the suit, however, DLI had abolished the Greek Department course developer position due to a lack of funding. Moreover, both plaintiff and Mr. Kuntelos are now close to retirement age. Thus, in applying the law to plaintiff's claim against the Union, the court has been mindful that it would be impossible to effectively reconstitute the course developer selection process a second time.

III. CONCLUSIONS OF LAW

"It is well established that . . . the exclusive bargaining representative of the employees in [a] bargaining unit . . . ha[s] a statutory duty fairly to represent all of those employees. . . ." *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 909, 17 L.Ed.2d 842 (1967). Plaintiff argues that the Union breached its duty to him by: (1) failing to consider his perspective when deciding to arbitrate Mr. Kuntelos' grievance, (2) neglecting to notify him of the Kuntelos arbitration and provide him with an opportunity to be heard at that arbitration, and (3) denying arbitration of his grievances. He seeks damages consisting of lost back pay and lost retirement pay benefits, as well as attorney's fees and costs for the instant suit and the suit before the FLRA.

A. *Breach of the Duty of Fair Representation*

1. *The decision to arbitrate Mr. Kuntelos' grievance.*

When a union becomes the exclusive bargaining agent for a bargaining unit, employees within that unit lose the power to bargain individually with their employer. The purpose of the duty of fair representation is to protect such employees from union abuses. The duty stands "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca*, 386 U.S. at 182, 87 S.Ct. at 912.

"A breach of the statutory duty of fair representation occurs . . . when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190, 87 S.Ct. at 916; *see also Gregg v. Chauffeurs, Teamsters & Helpers Union Local 150*, 699 F.2d 1015, 1016 (9th Cir.1983); *Robesky v. Quantas Empire Airways Limited*, 573 F.2d 1082, 1086 (9th Cir.1978). Arbitrary conduct is sufficient to constitute a violation; a bad faith motive or intent to hostilely discriminate is not required. *Robesky*, 573 F.2d at 1086. "To comply with its duty, a union must conduct some minimal investigation of grievances brought to its attention." *Tenorio v. N.L.R.B.*, 680 F.2d 598, 601 (9th Cir. 1982). "The thoroughness with which unions must investigate grievances in order to satisfy their duty varies with the circumstances of each case." *Id.*

It is clear, however, that a union's decision on whether to prosecute an employee's grievance must be "inclusive of a fair and impartial consideration of the interests of *all* employees." *Tedford v. Peabody Coal Co.*, 533 F.2d 952, 957 (5th Cir. 1976) (emphasis added); *see also Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229, 1236 (8th

Cir.) (en banc), *cert. denied*, 449 U.S. 839, 101 S.Ct. 116, 66 L.Ed.2d 46 (1980). The union must consider "not only the interests of [the grievant] but also those of the . . . employees who would suffer" should the union successfully take the grievance to arbitration. *Tedford*, 533 F.2d at 959; *see also Tenorio*, 680 F.2d at 602.

Thus, when the handling of a grievance deeply implicates the interests of more than one employee, the union should investigate and assess each affected employee's side of the dispute. *See generally Tenorio*, 680 F.2d at 601-03; *Smith*, 619 F.2d at 1237-41; *Automotive, Petroleum & Allied Industries Employees Union, Local 618 v. Gelco Corp.*, 584 F.Supp. 514, 515 (E.D.Mo.1984). For example, when two employees are competing for a position and the union is deciding which employee's position to support, the union must consider the relative qualifications of the employees. *See Gelco*, 584 F.Supp. at 516. In so doing, it may be necessary to inquire of the competitors "about their experience or other qualifications." *Smith*, 619 F.2d at 1240. Failing to take that step may represent a violation of the union's duty of fair representation. *Id.*

Those principles apply to the instant case. The Union's decision to arbitrate on behalf of Mr. Kuntelos had a severe effect on plaintiff, in that it ultimately led to plaintiff's demotion. Yet the Union made no effort to investigate plaintiff's views or qualifications prior to making its decision. Further, the Union showed no concern whatsoever for the consequences that arbitration of Mr. Kuntelos' grievance might have for plaintiff. By demonstrating that level of indifference towards an individual whose interests it was supposed to protect, the Union breached its duty to represent plaintiff fairly.

2. *Failure to notify plaintiff of the arbitration.*

The duty of fair representation not only dictates that unions must adequately investigate employee grievances, but also demands that unions shall, under certain circumstances, impart information to an employee or employees. In particular, a union may breach its duty by failing to convey to an employee critical facts about a grievance affecting the employee. *See Robesky*, 573 F.2d at 1088-91. The union need not withhold such information deliberately to violate its duty; it is sufficient if the union's failure to inform the employee is unintentional but "so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary." *Id.* at 1090.

Courts have applied that standard to situations in which a union has unintentionally failed to notify an employee of the arbitration of another person's grievance. *See, e.g., Smith*, 619 F.2d at 1241-43; *Bond v. Local Union 823, Internat'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 521 F.2d 5 at 9 (8th Cir.1975). The thrust of those cases is that such conduct is arbitrary and illegal if the arbitration could substantially affect the employee's interests, and the employee's position is not adequately presented to the arbitrator. *See Smith*, 619 F.2d at 1241.

Those requirements are met in the instant case. It is indisputable that the arbitration of Mr. Kuntelos' grievance substantially and detrimentally affected plaintiff. Further, there was no testimony at trial demonstrating that plaintiff's position had been adequately presented to Arbitrator Goldman. Accordingly, the Union's failure to notify plaintiff of the arbitration was a second breach of the Union's duty to represent plaintiff fairly.

3. The refusal to take plaintiff's grievances to arbitration.

Plaintiff contends that the Union committed a final breach of its duty when it refused to take his grievances to arbitration. The Union has defended against that claim, however, by asserting that plaintiff had no absolute right to have his grievance arbitrated.

The Union's statement of the law is undeniably correct. "A union is not required to take every grievance of its members to arbitration." *Gregg*, 699 F.2d at 1016; *see also Vaca*, 386 U.S. at 191, 87 S.Ct. at 917. But the Union's defense is incomplete. Although unions need not request arbitration of every employee grievance, their ability to deny arbitration is not unconstrained. Rather, a union's rejection of an arbitration request must be based on "an informed, reasoned judgment regarding *the merits* of the clai[m] in terms of the language of the collective bargaining agreement." *Smith*, 619 F.2d at 1237 (emphasis added); *see also Gelco*, 584 F.Supp. at 515; *Dutrisac v. Caterpillar Tractor Co.*, 511 F.Supp. 719, 726 (N.D.Cal.1981).

No such judgment was made in the instant case. Instead, the Union refused plaintiff's arbitration request for reasons unrelated to the merits of plaintiff's grievance. It thereby breached its duty of fair representation for a third time.

It makes no difference that the Union relied on the advice of its attorney in making its decision to reject plaintiff's request. "Reliance on an attorney's advice [does not] insulate [a] union from liability for . . . breach of its duty to represent its members fairly." *Gregg*, 699 F.2d at 1017. The Union is therefore accountable for its

unfair treatment of Mr. Karahalios, regardless of its reliance on the advice of counsel.[9]

B. *The Remedy for the Union's Breaches*

Having concluded that the Union failed to fulfill its duty to plaintiff, the court must now determine the proper remedy for the Union's misconduct. "The appropriate remedy for . . . breach of a union's duty of fair representation must vary with the circumstances of the particular breach." *Vaca*, 386 U.S. at 195, 87 S.Ct. at 919. Plaintiff has claimed several different elements of damages, which the court analyzes separately below.

1. *Lost back pay and retirement pay benefits.*

The first element of damages plaintiff claims is lost back pay and retirement pay benefits. In deciding whether plaintiff is entitled to recover such damages, it is significant that a union guilty of breaching its duty of fair representation may be held liable only for damages clearly attributable to its improper actions. *Anderson v. United Paperworkers Internat'l Union, AFL-CIO*, 641 F.2d 574, 580 (8th Cir.1981); *Self v. Drivers, Chauffeurs, Warehousemen & Helpers Local Union No. 61*, 620 F.2d 439, 444 (4th Cir.1980); *Soto Segarra v. Sea-Land Service, Inc.*, 581 F.2d 291, 298 (1st Cir.1978). Unions may not be held liable for damage awards based on speculation or conjecture. *See, e.g., Bloom v. Internat'l Brotherhood of Teamsters Local 468*, 752 F.2d 1312, 1313 (9th Cir. 1984); *United Steelworkers of America, AFL-CIO-CLC v. N.L.R.B.*, 692 F.2d 1052, 1057 (7th Cir.1982); *DeBoles v.*

[9] Moreover, the Union's course of action was not wholly consistent with the advice of its attorney, Saul Weingarten. Although Mr. Weingarten had suggested that the Union appoint independent counsel to take plaintiff's grievance to arbitration, the Union did not follow that course.

Trans World Airlines, Inc., 552 F.2d 1005, 1017-20 (3d Cir.1977).[10]

For example, in *Self* the Fourth Circuit overturned a district court's order requiring a union to compensate an employee for lost back pay and benefits. 620 F.2d at 443-44. The Court of Appeals explained that the district court's award could not stand because it "rest[ed] on mere conjecture—on the assumption that plaintiffs *might* not have been discharged, or *might* have been reinstated but for the Union's improper action or inaction." *Id.* at 443 (emphasis in original).

Similarly, in *Anderson* the Eighth Circuit disallowed a severance pay award against a union that had made misrepresentations to the employees it was supposed to represent. 641 F.2d at 578-81. The court reasoned that

[10] The Fifth Circuit took a different approach in *Abilene Sheet Metal, Inc. v. N.L.R.B.*, 619 F.2d 332, 348 (5th Cir.1980). In that case, an employee had filed a grievance, which his union had mishandled in a manner that made it impossible to subsequently determine the merit of his grievance.

The majority of courts would have disallowed the employee's recovery due to the uncertainty in the merit of his grievance. But the Fifth Circuit ruled instead that "the uncertainty [should be resolved] against the party that created it by an unlawful act." *Id.*

The Fifth Circuit's principle of resolving uncertainty against the wrongdoer has a certain appeal. Yet this court is also sensitive to the argument that "[s]pecial caution against excessive awards is counseled in the labor law context where a carefully conceived and administered balance between the rights, powers and duties of union, management and individual employee has been established by Congress on a national scale." *Soto Segarra v. Sea Land Service, Inc.*, 581 F.2d 291, 298 (1st Cir.1978). More fundamentally, however, this court need not thoroughly analyze the wisdom of the Fifth Circuit's approach, because the Ninth Circuit has rejected that approach, *see Bloom*, 752 F.2d 1312, 1313 (9th Cir.1984), and this court must follow the lead of the Ninth Circuit, *see Hasbrouck v. Texaco, Inc.*, 663 F.2d 930, 933 (9th Cir.), *cert. denied*, 459 U.S. 828, 103 S.Ct. 63, 74 L.Ed.2d 65 (1982).

"[t]he plaintiffs have not proved that but for [the union's] misrepresentations . . . they would have obtained their severance pay." *Id.* at 580.

The Ninth Circuit's recent decision in *Bloom* provides an additional illustration. In that case, a union made a false promise to its members in connection with the settlement of a labor dispute involving Safeway Stores. The district court held that the union had thereby breached its duty of fair representation and was thus liable for damages "in a measure of the difference between the settlement the union's members actually obtained from Safeway and the settlement they might have obtained by bargaining further instead of believing the union's false promise. . . ." 752 F.2d at 1313 (9th Cir.1984). But the Ninth Circuit overturned the damage award, explaining that "the record did not support the speculative assumption that Safeway would have increased its monetary settlement to the members by $4,000 per person." *Id.*

The circumstances of *Self*, *Anderson*, and *Bloom* are not unlike the ones in the instant case. As in those cases, the court is convinced that the union violated its duty to plaintiff. But, like the courts in *Self*, *Anderson*, and *Bloom*, the court is unable to say with a reasonable degree of assurance that but for the Union's improper treatment plaintiff would have obtained the pay and benefits he claims. The qualifications of plaintiff and Mr. Kuntelos were simply too evenly matched for the court to find that plaintiff had a clear edge over Mr. Kuntelos.[11] Thus, the

[11] In drawing the conclusion that plaintiff's qualifications were not clearly superior to those of Mr. Kuntelos, the court has not overlooked the testimony of plaintiff's son, Athas Karahalios, regarding reanalysis of the written essay test that plaintiff and Mr. Kuntelos took. Athas testified that DLI had scored the test using the scoring guidelines set forth in the

(continued)

court would merely be speculating if it ruled that plaintiff would have retained the course developer job and earned additional pay and benefits had the Union considered his qualifications in connection with Mr. Kuntelos' arbitration request, allowed him to present his views to Arbitrator Goldman, and assessed the merits of his grievances in ruling on his own arbitration request.

February 3, 1977 amendments to a government manual dated July 1, 1976. He further asserted that Arbitrator Goldman had mandated use of other guidelines: the ones in the government manual itself, not those in the February 3, 1977 amendments to that manual. According to Athas, if DLI had used the guidelines in the government manual, Mr. Kuntelos would have received an 83, plaintiff would have received an 85, and DLI would have referred plaintiff to the selecting official as a repromotion, thus ensuring plaintiff's reselection.

There are at least three problems with Athas' argument. First, and most importantly, the argument presupposes that plaintiff's test and Mr. Kuntelos' test can be meaningfully compared. Athas apparently would have this court assume that if any distortion of the results occurred due to the gap in testing dates, the difference in testing periods, and the lack of anonimity [*sic*] in grading, the distortion worked to plaintiff's disadvantage. The court cannot do that, however, because making such an assumption would amount to impermissible speculation.

A further weakness in Athas' analysis is its dependence on the theory that Arbitrator Goldman intended to have DLI ignore the amendments to the July 1, 1976 manual. Arbitrator Goldman's opinion is by no means explicit on that point, and this court is not certain that Athas' interpretation is consistent with the arbitrator's intent.

Finally, Athas' argument rests on the premise that plaintiff would have been selected if DLI had referred plaintiff to the selecting official as a repromotion. While such a result seems likely, the court is aware of no evidence suggesting that the selecting official would have been compelled to hire plaintiff if plaintiff had been referred as a repromotion. Indeed, from Arbitrator Goldman's opinion, it appears that the selecting official would have been free to reject any candidate referred as a repromotion, so long as the selecting official stated his reasons for doing so. Thus, the court would not be justified in using Athas' reasoning as a basis for awarding lost back pay and retirement pay benefits to plaintiff.

Further, at this late date, the court cannot eliminate the need for such speculation by reconstituting the course developer selection process a second time. See p. 445, *supra*. Accordingly, the court has reluctantly concluded that it must deny plaintiff's request for lost back pay and retirement pay benefits.

2. *Attorney's fees and costs.*

In addition to seeking compensation for lost back pay and retirement pay benefits, plaintiff seeks an award of the attorney's fees and costs he incurred in litigating his claims. That request must be considered as two separate requests: one for the attorney's fees and costs he incurred in his litigation against DLI, and one for the attorney's fees and costs he incurred in his suits against the Union.

There is solid support for the former request in the case law. Many courts have held that when a union breaches its duty of fair representation by failing to give proper consideration to an employee's grievance, the employee is entitled to "damages from the union to cover [the] expenses, including attorney's fees and costs, that [he] incurred in seeking a fair resolution of [his] claim against the employer." *Dutrisac*, 511 F.Supp. at 729; *see also Del Casal v. Eastern Airlines, Inc.*, 634 F.2d 295, 301 (5th Cir.1981), *cert. denied*, 454 U.S. 892, 102 S.Ct. 386, 70 L.Ed.2d 206 (1981); *Self*, 620 F.2d at 444; *Scott v. Local Union 377, Internat'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 548 F.2d 1244, 1245-46 (6th Cir.), *cert. denied*, 431 U.S. 968, 97 S.Ct. 2927, 53 L.Ed.2d 1064 (1977). Such an award is "an element of compensatory damages," *Hardesty v. Essex Group, Inc.*, 550 F.Supp. 752, 767 (N.D.Ind.1982); *see also Scott*, 548 F.2d at 1246; *Foster v. Bowman*

Transportation Co., Inc., 562 F.Supp. 806, 818 (N.D.Ala. 1983), and is proper even if it is uncertain whether the plaintiff would have prevailed in his claim against his employer, *see Dutrisac*, 511 F.Supp. at 729. Thus, in the case at hand, the Union is clearly liable to Mr. Karahalios for the amount that Mr. Karahalios spent litigating his claim against DLI before this court and before the FLRA.

Different considerations apply to plaintiff's request for reimbursement of the attorney's fees and costs he sustained in suing the Union. Plaintiff contends that such an award is necessary "to completely redress the [U]nion's breach." Plaintiff's Trial Brief, filed 6/12/84, at 18.

It is clear, however, that "attorney's fees incurred in bringing a [fair representation] action do not arise to the status of compensatory damages." *Cronin v. Sears, Roebuck & Co.*, 588 F.2d 616 at 619 (8th Cir.1978); *see also Hardesty*, 550 F.Supp. at 767. Further, the "American rule," clearly endorsed in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), is that "attorney fees are not ordinarily recoverable by the prevailing party in federal litigation absent statutory authorization," which does not exist for fair representation actions. *Emmanuel v. Omaha Carpenters District Council*, 422 F.Supp. 204, 210 (D.Neb.1976), *aff'd*, 560 F.2d 382 (8th Cir.1977).

Nonetheless, there is an important exception to the "American rule." When a plaintiff's suit confers a substantial benefit on others as well as on himself, courts may grant the plaintiff an award of attorney's fees. *Hall v. Cole*, 412 U.S. 1, 5, 93 S.Ct. 1943, 1946, 36 L.Ed.2d 702 (1973); *see also Emmanuel*, 422 F.Supp. at 210. That

doctrine, termed the "common benefit rationale," has provided a basis for attorney's fee awards in fair representation actions in which the plaintiff "'necessarily rendered a substantial service to his union as an institution and to all of its members.'" *Harrison v. United Transportation Union*, 530 F.2d 558, 564 (4th Cir.1975), *cert. denied*, 425 U.S. 958, 96 S.Ct. 1739, 48 L.Ed.2d 203 (1976), quoting *Hall v. Cole*, 412 U.S. at 8, 93 S.Ct. at 1947; *see also Emmanuel v. Omaha Carpenters District Council*, 560 F.2d 382, 385 (8th Cir.1977); *Bowen v. United States Postal Service*, 470 F.Supp. 1127, 1132 (W.D.Va.1979), *aff'd in part & rev'd in part on other grounds*, 642 F.2d 79 (4th Cir.1981), *rev'd on other grounds*, 459 U.S. 212, 103 S.Ct. 588, 74 L.Ed.2d 402 (1983).

This is an appropriate case for application of the "common benefit rationale." As a result of plaintiff's litigation before the FLRA, the Union agreed to post a notice advising its members of its obligations when two or more employees seek one position. Plaintiff's litigation thus significantly advanced the interests of individual union members by helping to inform them of their rights. Further, plaintiff's suit before this court involved novel jurisdictional issues regarding the ability of federal employees to bring fair representation action in federal district court. The court resolved those issues in favor of plaintiff, *see Karahalios v. Defense Language Institute, Etc.*, 534 F.Supp. 1202 (N.D.Cal.1982), so plaintiff's suit serves as a valuable precedent for every federal employee who prosecutes a fair representation claim in federal district court. It is clear, then, that "Mr. Karahalios' actions . . . have been responsible for major changes, both nationwide and in [his] local bargaining group." Plain-

tiff's Trial Brief, filed 6/12/84, at 18. Justice therefore requires that plaintiff receive damages for the attorney's fees and costs he incurred in prosecuting this action, as well as in pressing his charges before the FLRA.

IV. CONCLUSION

It is clear to the court that the Union breached its duty to plaintiff on three separate occasions. But the court is unable to compensate plaintiff for lost back pay and retirement pay benefits, because it cannot reliably determine whether plaintiff would have retained the course developer position absent the Union's breaches. The court has reached this conclusion with a certain sense of frustration, yet believes that the circumstances of this case leave it with no alternative course. As DLI Commandant Foster commented, plaintiff was the "innocent victim of circumstances beyond his control." Plaintiff's Exhibit 8.

Although the court has denied plaintiff's request for lost back pay and retirement pay benefits, it grants his claim for reimbursement of the attorney's fees and costs he incurred in his litigation before this court and before the FLRA. Plaintiff shall have until January 31, 1985 to file a detailed accounting of those expenses. If the Union has any objections to plaintiff's accounting, it must submit them in written form by February 14, 1985. Once the period for filing objections has elapsed, the court will determine whether a hearing on the amount of plaintiff's award is necessary.

SO ORDERED.

No. 87-636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EFTHIMIOS A. KARAHALIOS,

Petitioner,

v.

DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, PRESIDIO OF MONTEREY, and LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether a federal employee whose exclusive bargaining representative has violated its duty of fair representation may bring a claim for damages in federal district court; or, is his exclusive remedy to file an unfair labor practice charge with the Federal Labor Relations Authority?

LIST OF PARTIES

The plaintiff-petitioner in this case is Efthimios A. Karahalios.

The defendant-respondent in this case is Local 1263, National Federation of Federal Employees. An additional defendant below, Defense Language Institute/Foreign Language Center, Presidio of Monterey, is not a party which has an interest in the outcome of this petition.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The district court denied union motions to dismiss on jurisdictional grounds, reported at *Karahalios v. Defense Language Inst.*, 534 F. Supp. 1202 (N.D. Cal. 1982) (*Karahalios I*), and *Karahalios v. Defense Language Inst.*, 544 F. Supp. 77 (N.D. Cal. 1982) (*Karahalios II*). Joint Appendix ("JA") at 48 and 69. After trial, the district court entered judgment in favor of petitioner, reported at *Karahalios v. Defense Language Inst.*, 613

F. Supp. 440 (N.D. Cal. 1984) (*Karahalios III*). JA at 80. The opinion of the Court of Appeals for the Ninth Circuit which dismissed this case on jurisdictional grounds is reported at 821 F.2d 1389 (9th Cir. 1987), and was reproduced in Appendix A to the petition for certiorari ("Pet.App.") at 1a.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The petition for certiorari was filed on October 7, 1987, within ninety (90) days after the entry of the decision of the court of appeals, pursuant to 28 U.S.C. § 2101(c) and Rule 20.2, Rules of the United States Supreme Court. Certiorari was granted June 6, 1988. 108 S. Ct. 2032 (1988).

STATUTORY PROVISIONS INVOLVED

This case involves the general federal question jurisdiction statute, 28 U.S.C. § 1331, and Title VII of the Civil Service Reform Act of 1978 (Federal Service Labor-Management and Employee Relations Statute) ("CSRA"), 5 U.S.C. §§ 7101 *et seq.*, particularly 5 U.S.C. §§ 7114(a)(1), 7116, 7118 and 7123.

These statutes are set forth in the appendix to this brief.

STATEMENT OF THE CASE

Petitioner Efthimios Karahalios has worked for the federal government for many years. JA at 80, 82. Karahalios, who was not a union member, was part of a bargaining unit for which respondent Local 1263 of the National Federation of Federal Employees (the "union") was the exclusive bargaining representative. JA at 81. The collective bargaining agreements between the union and

the federal employer provided for an exclusive grievance procedure. The grievance procedure provided that only the union or the employer, but not the employee, could invoke arbitration. JA at 20, 26, 29 and 34.

In 1976, Karahalios was a Greek language instructor at the Defense Language Institute/Foreign Language Center, Presidio of Monterey (the "employer-agency"), in Monterey, California. JA at 82. During the many years that Karahalios had worked for the employer-agency, his work had been highly praised. JA at 82.

When a higher position (course developer) with substantially higher pay and prestige became available, Karahalios went through the competitive civil service selection process, and was promoted to course developer. JA at 82.

Karahalios performed satisfactorily as a course developer for almost a year. JA at 85. In the interim, another employee, Simon Kuntelos, filed a grievance alleging that he should have been given the course developer job without going through the competitive selection process. JA at 83. Kuntelos' grievance was denied by the employer-agency. *Id.* Kuntelos (a union board member[1]) requested that the union arbitrate his grievance. *Id.*

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[1] According to the district court's decision on the merits, the evidence arguably suggested that the union's decision to arbitrate on behalf of Kuntelos (the union board member) was based on a bad-faith policy of favoring union supporters over nonunion members of the bargaining unit. In addition to the fact that Kuntelos was a union board member and Karahalios was not even a union member, the district court noted that Kuntelos had offered to donate money to the union if he prevailed in arbitration. Further, the union had a history of chastising the employer-agency for failing to promote more union employees. Given that there was sufficient evidence of numerous violations of the duty of fair representation, the district court believed it unnecessary to rely upon the above facts in reaching its decision. JA at 83.

The union decided to arbitrate for Kuntelos without giving Karahalios notice that it was considering doing so, without considering Karahalios' qualifications for the job, and without taking into account the effect which the arbitration might have on Karahalios' position. JA at 83-84. When the Kuntelos arbitration took place, the union failed to give Karahalios notice of the hearing, or any opportunity to be present. Karahalios thus had no opportunity to present his views to the arbitrator. JA at 84. Even though Karahalios was not a party to the arbitration, had not been given notice of the hearing, and was not present at the hearing, the arbitrator ruled in favor of Kuntelos. The effect of the arbitrator's ruling was that Karahalios' position should be "reconstituted"; *i.e.*, Kuntelos should be permitted to go through the competitive selection process for Karahalios' position. JA at 84.

Kuntelos then went through the competitive selection process, but under radically different conditions than Karahalios. Kuntelos was tested almost a year after Karahalios. Kuntelos was the only one being tested, which meant that the graders were aware of whose test was being graded. JA at 84-85. Even though Karahalios was given only two hours to take the test, Kuntelos was given a full three-and-one-half hours to take the test, almost twice as long. *Id.* Karahalios was not given an opportunity to take the test at the same time and under the same conditions as Kuntelos, a factor the district court found most significant. *Id.*

Kuntelos, tested and scored under the altered testing procedure, received a marginally higher score than Karahalios' original score.[2] No attempt was made to retest Karahalios under the modified testing procedure. JA at 85.

[2] In addition to the other testing irregularities, evidence was presented (continued)

As a result of the test scores, both men were referred to the selecting official, who chose Kuntelos. JA at 85. Despite the fact that he had been performing satisfactorily in the course developer job for the last year, the employer-agency demoted Karahalios to the rank of instructor, a drop in grade from GS-11 to GS-9. JA at 85. The demotion resulted in loss of pay, commensurate loss of retirement benefits, and loss of prestige. JA at 82-90.

Karahalios took *every* step he could to object to the process by which he was deprived of his job. First, he completely exhausted his contractual remedies and second, his administrative remedies, all to no avail.

First, he filed two grievances with the employer-agency, charging that the process which led to his demotion was invalid due to the improper testing procedures. JA at 85. He received assistance from a union representative, who felt that Karahalios' grievances were meritorious. However, the employer-agency denied both grievances. *Id.*

Karahalios then requested that the union pursue these grievances to arbitration. The union, without any consideration of the merits of the grievance, decided not to arbi-

which tended to show that Kuntelos' test was improperly scored. Different scoring guidelines were used instead of the scoring guidelines called for by the arbitrator who "reconstituted" Karahalios' job. Karahalios produced evidence that, had the original guidelines been used, he would have scored higher than Kuntelos. Karahalios, not Kuntelos, would then have been referred to the selecting official as a "repromotion eligible." The district court indicated that it could not be certain which scoring guidelines the arbitrator would have used, had he been aware of the different guidelines. JA at 95-96, n.11.

Because of the fundamental irregularities in the testing process, the district court believed that the tests of the two employees simply could not be meaningfully compared. *Id.*

trate for Karahalios. JA at 86. The union apparently relied solely on a letter from counsel advising that arbitrating for Karahalios would constitute a "conflict of interest" with the earlier arbitration for Kuntelos. *Id.* The union refused to appoint independent counsel for Karahalios to take the case to arbitration, even though both the *union counsel* and Karahalios suggested that the union do so. JA at 86, n.7. Karahalios unsuccessfully attempted to invoke arbitration on his own, but the employer-agency refused to arbitrate on the basis that only the union could request arbitration, not an individual employee. JA at 87.

Second, Karahalios attempted to obtain redress through administrative channels. He filed unfair labor practice charges with the Federal Labor Relations Authority ("FLRA") against both the union and the employer-agency. JA at 87. The FLRA Regional Director dismissed both charges. Karahalios then appealed to the FLRA General Counsel. The General Counsel overturned the Regional Director, and specifically stated that the union had violated its duty of fair representation in denying Karahalios' request to arbitrate. The case was remanded with directions to the Regional Director to issue a complaint against the union, absent a settlement. JA at 41-42, and 87.

However, on remand, the Regional Director provided absolutely no relief to Karahalios. The Regional Director, in pursuing the FLRA's institutional goals and *without consulting Karahalios*, entered into one of the FLRA's pre-printed standard-form settlement agreements with the union. JA at 43. The only obligation imposed upon the union was the posting of a form notice (JA at 46-47) as follows:

WE HEREBY NOTIFY OUR MEMBERS THAT:

WE WILL NOT inform employees that where two or more employees are seeking one position, the union, the National Federation of Federal Employees, Local 1263, cannot represent all such employees in the contractual grievance procedure.

WE WILL NOT inform employees that it would be a conflict of interest for the union, the National Federation of Federal Employees, Local 1263, to represent all such employees.

WE WILL NOT in any like or related manner interfere with, restrain or coerce any employees in the exercise of their rights under the Statute.

Karahalios unsuccessfully objected to the settlement as it provided him with no relief whatsoever. JA at 88. Karahalios then sought review of the settlement by the FLRA General Counsel because the settlement was completely ineffectual as to him. The General Counsel, in his "unreviewable discretion," declined to overturn the settlement. *Id.*

Finally, Karahalios filed this lawsuit in federal district court against both the union for breach of the duty of fair representation and the employer-agency for breach of the collective bargaining agreement.[3] JA at 4. Prior to trial, the district court held that it had jurisdiction over

[3] The district court held that it had no jurisdiction for the action against the employer-agency. To the extent that the amount sought against the employer-agency was over $10,000, the district court held that, under the Tucker Act (28 U.S.C. §§ 1346 (a)(2), 1491), such actions had to be brought in the United States Claims Court. JA at 70-71.

The district court later granted summary judgment in favor of the employer-agency, from which an appeal was filed. JA at 2. The case against the employer-agency was settled after the appeal was filed.

the duty of fair representation claims pursuant to 28 U.S.C. § 1331, because there was an implied duty of fair representation arising out of the congressional grant of exclusive representation in the CSRA. *Karahalios I*, JA at 48.

After trial on the merits, the district court found that the union had violated its duty of fair representation to Karahalios in *three* separate instances: The first violation came when the union decided to arbitrate on behalf of Kuntelos (the union board member) for Karahalios' job—an action which ultimately led to Karahalios' demotion—without investigating Karahalios' views or qualifications, and without taking into account the consequences which the arbitration might have upon Karahalios' job. JA at 91. The second violation occurred when the union failed to provide any notice whatsoever to Karahalios that the Kuntelos arbitration was taking place, and similarly failed to present Karahalios' position to the Kuntelos arbitrator. JA at 91. The third violation came when the union refused to arbitrate for Karahalios without considering the merits of his grievance. JA at 92.

The district court awarded Karahalios damages in the form of attorneys' fees incurred in pursuing the FLRA unfair labor practice charges (JA at 98), and in the litigation against the union under the "common benefit" doctrine. *Harrison v. United Transportation Union*, 530 F.2d 558, 564 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976). JA at 99. Back pay damages were denied as the district court could not find that Karahalios had a "clear edge" over the other employee.[4] JA at 95.

[4] Karahalios contended on appeal that the tainted testing procedure and the union's breaches of the duty of fair representation made meaningful comparisons between the two employees impossible. However, the damage issues were not reached by the Ninth Circuit in light of its holding that there was no jurisdiction to hear the claim. Pet.App. at 7a.

The U.S. Court of Appeals for the Ninth Circuit reversed, reaching only the jurisdictional issue. The court held that notwithstanding this Court's rationale in *Vaca v. Sipes*, 386 U.S. 171 (1967), Congress intended in passing the CSRA to prevent a federal employee from suing his union for breach of the duty of fair representation in federal court. Pet.App. at 9a.

The Ninth Circuit opinion was filed July 13, 1987. The petition for writ of certiorari was timely filed on October 7, 1987. Certiorari was granted June 6, 1988.

SUMMARY OF ARGUMENT

For the last forty years, the federal courts have provided a judicial forum for employees injured by their unions' actions in violation of the duty of fair representation. *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944). In order to assure that the employee is not deprived of effective remedies when the exclusive representation system breaks down, this Court has long recognized that court jurisdiction over duty of fair representation cases is crucial. *Vaca v. Sipes*, 386 U.S. 171, 182-83 (1967). District court jurisdiction over duty of fair representation cases exists in every other national labor law structure—the private sector, *id.*; the railroad sector, *Steele*, 323 U.S. 192; and the postal sector, *Bowen v. United States Postal Service*, 459 U.S. 212 (1983). No reason exists to depart from these well-established rules and to carve out an exception where federal employees, as opposed to private sector employees, railway employees, or postal employees, are concerned.

In *Vaca*, the Court recognized that administrative agencies charged with administering labor relations sta-

tutes have pre-eminent institutional goals which may, at times, result in subordinating the individual employee's need for redress to bargaining unit-wide remedies (as happened in this case). If the damaged employee were deprived of a judicial forum, the basic principles underlying the duty of fair representation would be frustrated, and the constitutionality of the congressional grant of exclusive representation called into question. *Vaca*, 386 U.S. at 183. The concerns recognized by the Court in *Vaca* are equally present in the federal sector.

Private sector unions do not enjoy a monopoly on arbitrary and discriminatory conduct toward the employees they are charged with representing. As this case demonstrates, federal sector unions are as likely to abuse their exclusive representation powers—at the expense of individual employees in the bargaining unit—as are their union counterparts in the private sector.

As in the private sector, the federal employee injured by the arbitrary and discriminatory actions of his exclusive bargaining representative may well be deprived of any effective administrative remedy. The FLRA General Counsel, like the NLRB General Counsel in the private sector, may refuse to issue a complaint, even in a clearly meritorious case, or may opt in favor of a unit-wide solution at the expense of an individual solution for the employee (as it did in this case), leaving the employee remediless. The FLRA General Counsel's unreviewable discretion and the FLRA's overriding institutional concerns mandate a judicial forum for duty of fair representation cases to ensure redress for the harm done to the individual employee. *Vaca*, 386 U.S. at 182-83.

Congress manifested no intent to depart from the considerations underlying the rulings in *Steele* and *Vaca* when

it passed the CSRA. The legislative history demonstrates that Congress intended the remedial provisions of the federal sector collective bargaining system to track the NLRA model. There is absolutely no legislative history which indicates that Congress intended to create an exception to traditional district court jurisdiction over duty of fair representation cases. The sum total of the CSRA legislative history regarding the duty of fair representation is one congressman's three-line remark simply acknowledging that the unions representing federal employees had a duty of fair representation. Congressional intent to change the holding in *Vaca* where federal employees are concerned was never discussed in any guise whatsoever.

If Congress had actually intended to repeal the established rules of *Steele* and *Vaca* in the federal sector, it is reasonable to suppose that Congress would have said *something* about this, especially as these holdings represent some of the most fundamental concepts in the national labor relations structure. Congress' silence on this issue must be taken as acceptance of the long-established principles of *Steele* and *Vaca*. Certainly there was no congressional intent manifested at any time to reach a different result for federal sector employees; nor was there any indication of congressional intent to provide federal employee unions with immunity from lawsuits brought by injured employees.

In short, no valid reason exists for this Court to create an exception to the long-held principle of federal court jurisdiction over duty of fair representation claims where federal employees are concerned. Just as the Court recognized in *Vaca*, denial of a judicial forum to Karahalios would indeed "frustrate the basic purposes underlying the duty of fair representation." 386 U.S. at 182, n.8.

ARGUMENT

I. THE UNIQUE NATURE OF THE DUTY OF FAIR REPRESENTATION AND ITS ENFORCEMENT OVER THE PAST FORTY YEARS MANDATE THAT FEDERAL COURTS REMAIN OPEN TO FEDERAL EMPLOYEES INJURED BY THE ARBITRARY OR DISCRIMINATORY CONDUCT OF UNIONS CLOTHED WITH EXCLUSIVE REPRESENTATION POWERS.

This Court has long recognized that the broad authority of the union as an exclusive bargaining agent must be "accompanied by a responsibility of equal scope, the responsibility and duty of fair representation." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976), *citing Humphrey v. Moore*, 375 U.S. 335, 342 (1964). The duty of fair representation stands as "a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *DelCostello v. Teamsters*, 462 U.S. 151, 164, n.14 (1983), *citing Vaca*, 386 U.S. at 182.

In order to assure that the employee is not deprived of effective remedies when the exclusive representation system breaks down, this Court has repeatedly recognized that federal district court jurisdiction over duty of fair representation cases is essential. *DelCostello*, 462 U.S. at 164, n.14; *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 47-48, n.12 (1979); *Glover v. St. Louis-San Francisco R. Co.*, 393 U.S. 324, 328-29 (1969); *Vaca*, 386 U.S. at 182-83. Federal court jurisdiction over duty of fair representation claims exists regardless of whether the injured employee is a railway employee under the Railway Labor Act ("RLA"), 45

U.S.C. §§ 151 *et seq.*, *e.g.*, *Steele*, 323 U.S. 192, *Czosek v. O'Mara*, 397 U.S. 25 (1970); a private sector employee under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.*, *Vaca*, 386 U.S. 171, *Hines*, 424 U.S. at 564; or a postal service employee, *Bowen*, 459 U.S. at 218.[4]

This Court must now decide whether to create an *exception* to the district courts' traditional jurisdiction over duty of fair representation cases where federal employees (instead of railway employees, postal employees, or private sector employees) are injured by their exclusive representative.

Federal courts should not be barred to the injured employee simply because he works for the federal government. The same concerns which compelled district court jurisdiction under the RLA and NLRA, *i.e.*, the policies of preventing arbitrary and discriminatory union misconduct and of ensuring adequate redress for each individual employee injured by his union's misconduct, apply with equal force in the federal arena. Private sector unions, postal sector unions, and railway sector unions do not enjoy a monopoly on arbitrary, invidious, and bad-faith conduct toward the employees whom they are charged with representing. Federal employee unions (many of which also operate in the private sector) should not be held to a lesser standard of accountability where federal sector employees (as opposed to private sector employees) are involved.

As this case aptly demonstrates, the federal courts must remain open or the damages suffered by the individual employee may be too easily subordinated to the institutional concerns of the FLRA (or NLRB), leaving the employee remediless.

> The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine.

Vaca, 386 U.S. at 183.

II. FEDERAL COURT JURISDICTION OVER DUTY OF FAIR REPRESENTATION CLAIMS HAS LONG BEEN RECOGNIZED AS AN ESSENTIAL UNDERPINNING OF THE COLLECTIVE BARGAINING FRAMEWORK.

One of the cornerstones in the private sector labor law structure is the union's duty of fair representation. The Court has recognized that, "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Vaca*, 386 U.S. at 182. "In vesting the representatives of the majority with this broad power Congress did not, of course, authorize a tyranny of the majority over minority interests." *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 64 (1975); *see also*, *DelCostello*, 462 U.S. at 164, n.14; *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 171, 180 (1967). Consequently, the Court has fashioned the duty of fair representation to counterbalance Congress' grant of exclusive representation power to the unions. *Vaca*, 386 U.S. at 177; *Humphrey*, 375 U.S. at 342; *Steele*, 323 U.S. at 202-03.

Essential to the duty of fair representation is the injured employee's unconditional ability to seek redress in the courts. *Vaca*, 386 U.S. at 182. This Court in *Vaca*

underscored the significance of the special concerns of the individual employee in a duty of fair representation case, and held that these interests compelled *judicial*, as opposed to merely administrative, review:

> *[T]he unique interests served by the duty of fair representation doctrine have a profound effect, in our opinion, on the applicability of the pre-emption rule to this class of cases....* The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit. This Court recognized in *Steele* that the congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination. Since that landmark decision, *the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.*

386 U.S. at 182 (citations omitted) (emphasis added).

The Court further acknowledged that the NLRB, as an administrative agency, is not particularly well structured to remedy *individual* duty of fair representation injuries. Unlike a trial court, redress of individual grievances is not the primary purpose of administrative agencies such as the NLRB (or the FLRA). 386 U.S. at 182, n.8. *Vaca* recognized that the NLRB's (and, by extension, the FLRA's) administrative focus in considering an unfair labor practice case where the duty of fair representation is involved does not specifically concern the wrong done to the employee.

> The public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies. Thus, the General Counsel will refuse to bring complaints on behalf of injured employees where the injury complained of is "insubstantial."

Id. (citations omitted).

Considering the necessarily limited institutional role of the NLRB, together with the NLRB General Counsel's unreviewable discretion to issue unfair labor practice complaints, this Court in *Vaca* acknowledged that the available administrative remedies were often inadequate in duty of fair representation cases. The Court was concerned that the limited administrative focus of the NLRB might lead to a group of employees whose individual complaints were never adequately redressed. This concern led directly to the enunciation in *Vaca* of the right to have these issues determined by a court, not the NLRB. Only in a court, where the focus is on the wrongs done to the individual employee before it, would the harm done to the employee be adequately and completely remedied. As Justice White emphasized in *Vaca*:

> The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine.

386 U.S. at 183.

Even though the union's actions in question might also constitute an unfair labor practice which could be heard by the NLRB, the Court's solicitude for the po-

tential inadequacy of the administrative remedy for individual employees led to the holding that the courts must provide a forum for individual redress. *Id.*, at 188. As the Court has recognized, where duty of fair representation cases are involved, the right of the individual employee to be made whole is "[o]f paramount importance," *Bowen*, 459 U.S. at 222; *cf. Foust*, 442 U.S. at 49; *Steele*, 323 U.S. at 206-07. This is a concept which necessitates a judicial, not an administrative, forum.

This case provides an excellent example of the exact concerns recognized by *Vaca*. Karahalios' long and unproductive journey through the FLRA in this matter was chronicled in the district court complaint. JA at 4. The year and a half of processing charges against both the employer and the union resulted in a determination by the FLRA General Counsel that the union had committed an unfair labor practice when it breached its duty of fair representation to Karahalios. JA at 41-42.

However, instead of pursuing a remedy for the harm done to Karahalios by the union, the FLRA Regional Director entered into a settlement agreement with the union which provided for dismissal of the case so long as the union would post a notice advising its other employees that it would not behave towards them in the future as it had behaved towards Karahalios. JA at 43. This settlement was reached without the agreement, and over the express objections, of Karahalios, the injured party. JA at 88. This settlement provided no compensation whatsoever to Karahalios for the union's wrongdoing. It should be noted that nowhere in the FLRA correspondence is there any discussion of the financial impact of the union's wrongful conduct on Karahalios. JA at 42, 44; Exhibit 19 to First Amended

Complaint, Tab 14, Excerpts of Record on Appeal. Compensating Karahalios for the harm done to him was evidently not the primary concern of the FLRA here.

The actions of the FLRA may well have been calculated to promote labor peace in the federal employment sector. But what of the employee who was actually harmed in this case? No actions taken by the FLRA even pretend to be a remedy for him.

This is *precisely* the wrong about which this Court was so concerned in *Vaca*. The agency charged with keeping the peace in the federal employee context has done exactly that, but in the process it ignored the individual harm to this employee. Surely a comprehensive system of federal labor relations cannot ask the federal employee to surrender his individual rights to a union, but then strip him of the ability to obtain an effective remedy when the union abdicates its responsibilities. The courthouse is the only forum where the individual employee can be assured that the harm done to him by the union will be unconditionally and adequately redressed.

III. THE LOGIC AND STRUCTURE OF CONGRESS' FEDERAL LABOR RELATIONS SCHEME COMPEL THE ASSERTION OF FEDERAL COURT JURISDICTION OVER DUTY OF FAIR REPRESENTATION BREACHES IN THE FEDERAL SECTOR.

A. CONGRESS USED THE PRIVATE SECTOR COLLECTIVE BARGAINING SYSTEM AS A MODEL FOR FEDERAL SECTOR LABOR RELATIONS.

When Congress enacted the CSRA, it was intended to be a comprehensive revision of the laws regarding federal

government employees. *Bureau of Alcohol, Tobacco, and Firearms v. FLRA*, 464 U.S. 89, 91 (1983). Included in the revision was the first congressional codification of a federal sector collective bargaining system. 5 U.S.C. §§ 7101 *et seq.*; *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. at 91; *see generally* Brower, *The Duty of Fair Representation Under the Civil Service Reform Act: Judicial Power to Protect Employee Rights*, 40 OKLA. L. REV. 361 (1987).

Congress closely modeled the new federal sector collective bargaining system on the private sector scheme under the NLRA. *National Treasury Employees Union v. FLRA*, 810 F.2d 295, 299-300 (D.C. Cir. 1987); *Columbia Power Trades Council v. United States Dept. of Energy*, 671 F.2d 325, 326 (9th Cir. 1982); *See* H.R. REP. NO. 1403, 95th Cong., 2d Sess. 1, 41 (1978); Message of Pres. Carter on Civil Service Reform, March 2, 1978, *reprinted in* H.R. REP. NO. 1403 at 102; *see also Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. at 92-93, 107. There is little doubt that in enacting the CSRA Congress intended to adopt the same basic framework for resolving collective bargaining disputes as existed in the private sector. Both the structure of the CSRA and the legislative history bear this out. The parallels between the CSRA and the NLRA are striking. As in the NLRA, Title VII of the CSRA provides for the election of bargaining representatives by majority vote (*compare* 29 U.S.C. § 159 *with* 5 U.S.C. § 7111(b)-(d)), and exclusive union representation (*compare* 29 U.S.C. § 159(a) *with* 5 U.S.C. § 7111(a)).

The collective bargaining structure in the CSRA is based upon familiar NLRA concepts. To administer this new collective bargaining system, Congress created a new administrative agency—the FLRA—which was intended

to be directly analogous to the private sector NLRB. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. at 92-93, 97. There is clear congressional intent to make the role and powers of the FLRA mirror those of the NLRB.

> The Committee intends that the Authority's role in Federal sector labor-management relations be analogous to that of the National Labor Relations Board in the private sector.

H.R. REP. NO. 1403, at 41.

As another part of the administrative structure, Congress created the office of the FLRA General Counsel, which was designed to play a role identical to the NLRB's General Counsel.

> It is intended that unfair labor practice complaints will be handled by the General Counsel of the Authority in a manner essentially identical to the National Labor Relations Board in the private sector.

S. REP. NO. 969, 95th Cong., 2d Sess. 3, 106 (1978).

The FLRA General Counsel has "unreviewable discretion" to issue or refuse to issue an unfair labor practice complaint, just as the NLRB General Counsel has. *Compare* 5 U.S.C. § 7118(a)(1) *with* 29 U.S.C. §§ 153(d), 160(b); *see also* H.R. REP. NO. 1403 at 52; S. REP. NO. 969, at 102; *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-39 (1975); *Turgeon v. FLRA*, 677 F.2d 937, 940 (D.C. Cir. 1982).

The CSRA also provides for judicial review of certain actions of the FLRA, which closely parallels companion provisions in the NLRA. First, both statutes permit circuit court review of final orders of the administrative agencies (the FLRA and the NLRB). *Compare* 5 U.S.C. § 7123(a) *with* 29 U.S.C. § 160(f). Second, the FLRA (or the NLRB) may petition the court of appeals for enforcement of any FLRA (or NLRB) order. *Compare* 5 U.S.C. § 7123(b) *with* 29 U.S.C. § 160(e). Third, the FLRA (like the NLRB) may petition the district court for temporary injunctive relief after an unfair labor practice complaint has been issued. *Compare* 5 U.S.C. § 7123(d) *with* 29 U.S.C. § 160(j).

This Court has recognized that the CSRA was based upon many of the same basic policies underlying the collective bargaining process in the private sector model. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. at 107-08. The similarities between the two acts have led this Court, as well as lower courts, to use the well-developed private sector case law for guidance in interpreting many areas of the CSRA. *E.g., EEOC v. FLRA*, 476 U.S. 19, 23 (1986) (*per curiam*) (NLRA used as model for determining procedure for judicial review of FLRA actions); *National Treasury Employees Union v. FLRA*, 810 F.2d at 299 (mid-term duty to bargain rules under NLRA used to determine whether mid-term bargaining is necessary under CSRA); *Library of Congress v. FLRA*, 699 F.2d 1280, 1286-87 (D.C. Cir. 1983) (NLRA precedent used to determine scope of duty to bargain regarding matters beyond the exclusive control of the employer-agency).

However, lower courts have declined use of the NLRA model as controlling precedent where policies unique to the federal sector have been involved. *Library of Congress v. FLRA*, 699 F.2d at 1287; *National Treasury Employees Union v. FLRA*, 826 F.2d 114, 122 (D.C. Cir 1987).

Thus, in *National Treasury Employees Union v. FLRA*, 826 F.2d at 121-22, the District of Columbia Circuit held that unique federal sector considerations in efficient government management allowed the employer-agency to solicit suggestions directly from the employees for improvement of the workplace, a result which would have been barred *per se* in the private sector. This result recognizes that the government, as the employer, has some distinct differences from the private employer.[5]

In this case, however, there are no unique "governmental employer" concerns which require different treatment of duty of fair representation violations when they occur in the federal sector. The same policy considerations underlying district court jurisdiction over duty of fair representation claims in the private sector are present with equal force in the federal sector. *See* Brower, 40 OKLA. L. REV. at 387. The FLRA, in following its institutional mandate in identical fashion to the NLRB, may well overlook the injuries sustained by an individual employee in favor of creating a bargaining unit-wide remedy (as in this case). The individual employee passed over by this process has no effective remedy to recover the damages caused by his union's breach.

B. THERE IS NO INTIMATION IN THE CONGRESSIONAL HISTORY THAT CONGRESS, IN PASSING THE CSRA, INTENDED IN ANY WAY TO DEPART FROM WELL-RECOGNIZED DISTRICT COURT JURISDICTION OVER DUTY OF FAIR REPRESENTATION CLAIMS.

[5] For example, both compulsory arbitration of grievances and the use of the strike weapon are treated differently in the federal sector due to congressional concerns about the special nature of public employee labor relations. *Compare* 5 U.S.C. § 7117 *with* 29 U.S.C. § 158(a)(5) *and* (b)(3) (duty to bargain); *compare* 5 U.S.C. § 7116(b)(7) *with* 29 U.S.C. §§ 157 *and* 158 (legitimacy of the strike weapon).

1. THERE WAS *NO* CONGRESSIONAL DISCUSSION OF FEDERAL COURT JURISDICTION OVER DUTY OF FAIR REPRESENTATION CASES WHEN THE CSRA WAS PASSED. IF CONGRESS HAD WANTED TO ALTER FORTY YEARS OF THIS COURT'S PRECEDENTS AND ELIMINATE THE JUDICIALLY ENFORCEABLE DUTY OF FAIR REPRESENTATION IN THE CSRA, ONE MIGHT REASONABLY EXPECT CONGRESS TO HAVE SAID *SOMETHING* ABOUT THAT ISSUE.

Although the legislative history of the CSRA is voluminous, it contains virtually nothing pertaining to the duty of fair representation or to federal court jurisdiction over fair representation claims. *See* Brower, 40 OKLA. L. REV. at 365-77. While there are ample indications in the legislative history that Congress intended to substantially strengthen the role of the unions when it passed the CSRA (*Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. at 107; Brower, 40 OKLA. L. REV. at 361-62), there is no indication that Congress paid any attention whatsoever to the duty of fair representation issues specifically presented in this case. In the 179 pages of debate on the CSRA in the *Congressional Record*, there is no mention of the duty of fair representation. Brower, 40 OKLA. L. REV. at 368-69.

The *only* mention of the duty of fair representation in any part of the legislative history came when Representative Ford, after the debates, made a brief remark as he was introducing the joint House-Senate committee bill. His only statement in this regard was: "The labor organization is required to meet a duty of fair representation for all employees, even if not dues paying members, who

use the negotiated grievance procedure." 124 CONG. REC. H13,609 (daily ed. Oct. 4, 1978) (remarks of Rep. Ford). Representative Ford's single remark is hardly sufficient to infer congressional intent to depart from the considerations enunciated in *Steele* and *Vaca*, and to preclude traditional district court jurisdiction over duty of fair representation cases.

Nothing in the CSRA's legislative history indicates that Congress intended to force individual federal employees to work in a system which offers them no certain protections from abuse by their exclusive representative. Given the significance of this Court's decision decades ago in *Vaca*, if Congress did intend to depart from *Vaca* and extinguish federal court jurisdiction over duty of fair representation cases in the federal sector, it is certainly reasonable to assume that some meaningful discussion on this subject would have occurred at some point in the legislative history. *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is held to be aware of the Court's decisions when it enacts legislation); *United States v. Fausto*, 484 U.S. _____, 108 S. Ct. 668, 677 (1988) (Blackmun, J., concurring) ("well established aversion to recognizing 'implied' repeals of remedial provisions or of judicial review"). If Congress intended to provide immunity from suit in federal district court for federal sector unions guilty of malfeasance, surely some mention of this subject would have taken place during the congressional debates, either from the union proponents or union adversaries.

Instead, there is *absolutely no discussion* of this issue, and, accordingly, no indication of any sort that Congress wished to depart from the principles established forty years ago in *Steele* and firmly underscored again twenty

years ago in *Vaca*. In fact, what little legislative history exists indicates that Congress intended the federal judiciary to play the same role *vis-a-vis* the FLRA as they do for the NLRB.[6]

2. THE FEDERAL COURTS' TRADITIONAL JURISDICTION OVER DUTY OF FAIR REPRESENTATION CLAIMS IS NOT PRECLUDED IN THE FEDERAL SECTOR BY THE LACK OF AN ANALOGUE TO § 301 OF THE NLRA.

The Ninth Circuit below and some other lower courts which have refused to accept jurisdiction over federal employees' duty of fair representation claims have premised that refusal upon the lack of a supposed analogue in the CSRA to § 301 of the NLRA, 29 U.S.C. § 185.[7]

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[6] Under the CSRA (just as under the NLRA), appellate court review of a final order of the FLRA is available. *Compare* 5 U.S.C. § 7123(a) *with* 29 U.S.C. § 160(f). This judicial involvement in federal sector labor relations was a marked departure from the supplanted Executive Order system. Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 Comp.); *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. at 92 (no judicial review of Federal Labor Relations Council orders).

Further, a floor amendment by Rep. Collins of Texas which would have transplanted the virtually nonexistent role of the courts from the Executive Order into the CSRA (124 CONG. REC. H9618-24 (daily ed. Sept. 13, 1978)) was soundly defeated in favor of a substitute amendment by Representative Udall which provided increased judicial power. 124 CONG. REC. H9625-32 (daily ed. Sept. 13, 1978). The Udall substitute essentially became 5 U.S.C. § 7123(a) and (b). *See* Brower, 40 OKLA. L. REV at 374.

Of course, the corresponding availability under the NLRA of circuit court review of NLRB actions has not precluded district court jurisdiction for duty of fair representation claims. *E.g., Vaca*, 386 U.S. 171; *DelCostello*, 462 U.S. 151; *Bowen*, 459 U.S. 212.

[7] Originally, the House version of the CSRA contained a provision, § 7121(c), which permitted parties to the collective bargaining agreement

(continued)

Pet.App. at 13a; *Warren*, 764 F.2d at 1397-99; *contra*, *Pham v. AFGE, Local 916*, 799 F.2d 634, 638-39 (10th Cir. 1986).

The lower courts which refused to accept jurisdiction over federal employees' duty of fair representation claims because of the lack of a § 301 analogue in the CSRA did so based upon two demonstrably faulty premises: (1) that § 301 is the basis of federal court jurisdiction over duty of fair representation claims in the private sector; and (2) that Congress considered and deleted a section of the CSRA, § 7121(c), that was supposedly analogous to § 301 of the NLRA.

a. Section 301 of the NLRA is not the basis of federal court jurisdiction over private sector duty of fair representation claims; such jurisdiction arises under the congressional grant to the unions of exclusive representation power.

Those courts which have refused to assert jurisdiction over federal employees' duty of fair representation claims because of the lack of a § 301 analogue in the CSRA have failed to recognize that § 301 does not provide the jurisdictional basis for private sector duty of fair representation claims. *See DelCostello*, 462 U.S. at 164.

This Court has recognized: (1) that jurisdiction over duty of fair representation claims is implied from the grant of exclusive representation status, *id*; (2) that jurisdiction

to petition the district courts to compel arbitration if the contract so provided. The Eleventh Circuit, for instance, analogized proposed § 7121(c) of the CSRA to § 301 of the NLRA, and held that Congress' failure to actually enact § 7121(c) in the CSRA showed an intention to limit the federal courts' jurisdiction over duty of fair representation claims. *Warren v. Local 1759, AFGE*, 764 F.2d 1395, 1397-99 (11th Cir.), *cert. denied*, 474 U.S. 1006 (1985).

exists over such claims arising under the RLA (which has no § 301 analogue), *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324 (1969); and (3) that jurisdiction exists over such claims, regardless of whether they are coupled with a § 301 "hybrid" claim against an employer. *Communications Workers of America v. Beck*, ____ U.S. ____, 108 S. Ct. 2641 (1988). Under these familiar principles, district court jurisdiction over duty of fair representation claims in the federal sector is clearly appropriate, because these claims "arise under" the congressional grant of exclusive representation. *See* 28 U.S.C. § 1331.

The duty of fair representation did not find its genesis in any explicit statute. In the private sector the duty has been judicially fashioned by this Court from the national labor statutes, in both the RLA and NLRA contexts. *E.g.*, *Steele*, 323 U.S. 192 (RLA); *DelCostello*, 462 U.S. at 164 (NLRA).

In a companion case to *Steele*, *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 213 (1944), the Court specifically held that federal court jurisdiction over employees' duty of fair representation claims was predicated upon 28 U.S.C. § 41(8), the statutory predecessor of 28 U.S.C. § 1337.[8] Significantly, both *Steele* and *Tunstall* arose under the RLA, which contains *no* § 301, or even a rough analogue thereto. In fact, *Steele* and *Tunstall* predated the enactment of § 301 of the NLRA by several years.

[8] 28 U.S.C. § 1337 is the commerce counterpart of 28 U.S.C. § 1331, the "general federal question jurisdiction" statute. It is generally recognized that § 1337 is merely the more specific of these two jurisdictional grants, and that any case which can be brought under § 1337 can also be brought under § 1331. *See* 13B Wright & Miller, *Federal Practice & Procedure*, § 3574 (1984); *Gorski v. Local Union 134*, 636 F. Supp. 1174, 1183, n.14 (N.D. Ill. 1986).

Since *Steele* and *Tunstall*, many other duty of fair representation cases have arisen under the RLA, and federal courts have had unquestioned jurisdiction notwithstanding the lack of a § 301 analogue in that statute. *See, e.g., Glover*, 393 U.S. 324; *Conley v. Gibson*, 355 U.S. 41 (1957); *Bagnall v. Airline Pilots Association*, 626 F.2d 336 (4th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981).

Moreover, under the NLRA, this Court has recently recognized that many private sector duty of fair representation suits comprise two distinct causes of action: one against the employer for breach of contract under § 301, and the other against the union for breach of the duty of fair representation, with jurisdiction impliedly arising under the congressional grant of exclusive representation contained in § 9(a) of the NLRA. *DelCostello*, 462 U.S. at 164, n.14. *See also Bowen*, 459 U.S. 212. (These combined claims have been referred to as "hybrid § 301/fair representation" claims.) *DelCostello* teaches that the true jurisdictional bases for the union's portion of the "hybrid" duty of fair representation claim are 28 U.S.C. §§ 1331 and 1337, because those claims "arise under" the congressional grant of exclusive representation, § 9(a) of the NLRA. *See* Boyce & Turner, *Fair Representation, the NLRB, and the Courts* 123-27 (No. 18, Labor Relations and Public Policy Series, University of Pennsylvania Wharton School, Industrial Research Unit, 1984).

In addition to "hybrid" § 301/fair representation claims, employees in the private sector have successfully brought duty of fair representation actions against their unions for a wide array of arbitrary, discriminatory and hostile conduct which was *not* specifically related to any

employer breach of contract. *E.g., Beck*, 108 S. Ct. 2641 (union uses nonmembers' agency fees for political activities); *Anderson v. United Paperworkers*, 641 F.2d 574 (8th Cir. 1981) (union misrepresentation regarding contract ratification issue); *Bowman v. Tennessee Valley Authority*, 744 F.2d 1207 (6th Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) (union negotiates contract discriminating against nonunion members of the bargaining unit); *Richardson v. CWA*, 443 F.2d 974, 983 (8th Cir. 1971) (union-inspired harassment and physical violence directed against nonunion employee). Many lower courts have held that the proper jurisdictional bases for these types of "bare" duty of fair representation claims are 28 U.S.C. §§ 1331 and 1337. *See Retana v. Apartment, Motel, Hotel & Elevator Operators Local 14*, 453 F.2d 1018 (9th Cir. 1972); *Smith v. Local 25, Sheet Metal Workers*, 500 F.2d 741 (5th Cir. 1974); *Anderson*, 641 F.2d at 576; *Gorski*, 636 F. Supp. at 1182-83; *see also* Boyce & Turner, *Fair Representation, the NLRB, and the Courts* 123-27.

Thus, federal court jurisdiction over fair representation claims does not depend on the existence of a § 301 "analogue." Moreover, as the Tenth Circuit recognized, the lack of a § 301 analogue in the CSRA may conceivably reflect congressional concerns regarding waiver of sovereign immunity for the federal employer. *Pham*, 799 F.2d at 638-39. Congress may indeed have intended to protect the sovereign from damage claims by injured employees. However, sovereign immunity considerations are unique to the federal employer and have nothing to do with the relationship between the federal employee and his union. As the Tenth Circuit acknowledged, "it does not follow that Congress intended to proscribe private actions by

federal employees against their unions simply because it did not create a § 301 twin in the [CSRA]." *Id.*

b. In passing the CSRA, Congress did not delete a provision analogous to § 301 of the NLRA.

The Ninth Circuit, and other lower courts, have erroneously concluded that congressional intent to preclude district court jurisdiction over duty of fair representation claims can be divined from Congress' failure to pass a provision (H.R. 11,280, proposed § 7121(c)) which would have authorized suits for injunctions to compel arbitration in district court. Pet.App. at 9a-10a; *Warren*, 764 F.2d at 1398-99; *Yates v. Soldiers & Airmen's Home*, 533 F. Supp. 461 (D.D.C. 1982); *contra*, *Karahalios II*, 544 F. Supp. at 80 (JA at 69), *rev'd*, 861 F.2d at 1391-92 (Pet.App. at 1a).

Proposed § 7121(c) was omitted in the joint committee mark-up of Title VII, with no explanation other than "[t]he House recedes." H.R. CONF. REP. NO. 1717 at 157. Simply stated, the omission of that section cannot bear the construction forced upon it by the Ninth Circuit.

Section 7121(c), by any reading, is not the equivalent of § 301 of the NLRA. Section 301 is a broadly worded statute, differing from § 7121(c) in both language and scope. Section 301 specifically gives the district courts jurisdiction over any suits for violation of contracts between employers and unions:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

On the other hand, proposed § 7121(c) is a sharply limited statute which would have provided district court jurisdiction *only* over injunctive requests between employer and union to compel arbitration:

> Any party to a collective bargaining agreement aggrieved by the failure, neglect, or refusal of the other party to proceed to arbitration pursuant to the negotiated grievance provided in the agreement may file a petition in the appropriate United States District Court requesting an order directing that arbitration proceed pursuant to the procedures provided therefore in the agreement. The court shall hear the matter without jury, expedite the hearing to the maximum extent practicable, and issue any order it determines appropriate.

H.R. 11,280, § 7121(c).

The House Report regarding § 7121(c) shows the purpose of the provision to be focused on a single consideration: the power of the union or the employer-agency to seek an injunctive order to compel arbitration under a collective bargaining agreement. H.R. REP. NO. 1403 at 56. There is no mention in that report or in contemporaneous portions of the *Congressional Record* of any other purpose for the provision.

The removal of § 7121(c) by the Joint House-Senate Committee gives no indication of why the provision was not retained. Nor is there any explanation for the deletion in the *Congressional Record*. *See* 124 CONG. REC.

H11,820-27 (daily ed. Oct. 6, 1978). Since neither the presence nor the absence of the provision occasioned much thought on the part of Congress, the inferences which may be drawn from the cryptic comment, "[t]he House recedes," are minimal.

Additionally, lawsuits by unions or employers to compel conformity with the arbitration provisions of collective bargaining agreements, *e.g.*, proposed § 7121(c) actions, raise substantially different concerns than do fair representation lawsuits. Enforcement of collective bargaining agreements by compelling arbitration frequently entails examination of the provisions of the agreements themselves. *E.g.*, *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702 (1982); *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976); *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960). Deferral of these questions to the administrative agency presumably familiar with the particular contours of the scope of bargaining and arbitration in the federal sector is appropriate (*see* 5 U.S.C. §§ 7101, 7116(b)(7), 7117; *National Federation of Federal Employees v. Commandant, Defense Language Institute*, 493 F. Supp. 675, 679 (N.D. Cal. 1980))—especially since the two principal actors, unions and employers, are powerful enough to have their voices heard in the administrative forum. However, the fair representation obligation stems from a diametrically opposite premise: that the collective bargaining system and administrative procedures do not adequately protect the interests of the individual when they diverge from the principal actors. *Vaca*, 386 U.S. at 182-83; *Steele*, 323 U.S. at 202-03.

Further, in the private sector, binding arbitration is viewed as the *quid pro quo* for the no-strike clause (*Teamsters Local 174 v. Lucas Flour*, 369 U.S. 95 (1962)) and injunctions to compel arbitration may be tied to no-strike provisions. *See*, *e.g.*, *Buffalo Forge Co.*, 428 U.S. 397; *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). Since both the right to strike and compulsory arbitration raise different concerns in the federal sector, the eventual removal of § 7121(c) may well reflect a policy choice by Congress to defer these special federal sector questions to the administrative body created to handle them. In contrast, duty of fair representation claims raise none of these unique federal sector concerns.

The scant legislative history on the deletion of § 7121(c), and the vast differences between it and § 301 of the NLRA, provide no support for the contention that Congress intended to deprive federal courts of jurisdiction over duty of fair representation claims in the federal sector.

IV. IMPORTANT POLICY CONSIDERATIONS COMPEL A FINDING THAT FEDERAL EMPLOYEES HAVE THE RIGHT TO PURSUE DUTY OF FAIR REPRESENTATION CLAIMS IN FEDERAL COURT.

The same considerations which compel district court jurisdiction over duty of fair representation cases in the private sector, the railway sector, and the postal sector similarly compel jurisdiction over the same cases in the federal sector.

A. THE CONGRESSIONAL GRANT OF THE EXTRAORDINARY POWER OF EXCLUSIVE REPRESENTATION IS EQUIVALENT UNDER THE NLRA,

RLA AND CSRA. THERE ARE NO POLICY CONSIDERATIONS IN THE FEDERAL SECTOR WHICH WOULD JUSTIFY ELIMINATING A JUDICIAL REMEDY FOR EMPLOYEES INJURED BY INVIDIOUS UNION CONDUCT SOLELY BECAUSE A FEDERAL SECTOR EMPLOYER IS INVOLVED.

Because the CSRA was modeled upon the NLRA, courts and litigants have generally imported NLRA case law in deciding CSRA issues. *E.g.*, *National Treasury Employees Union v. FLRA*, 800 F.2d 1165, 1169-71 (D.C. Cir. 1986). This rule has not been applied blindly, as there are provisions unique to the CSRA which express special federal sector concerns not present in the NLRA or RLA contexts. For instance, the CSRA contains certain provisions alien to the collective bargaining framework established under the RLA and the NLRA. *See*, *e.g.*, 5 U.S.C. § 7106 ("Management Rights," limiting the scope of bargaining); and 5 U.S.C. § 7113 ("National Consultation Rights," requiring consultations with minority unions).

These special federal employer concerns have received judicial recognition in limited departures from the NLRA model, where such employer concerns exist, and where reference to the NLRA model appears unwarranted. *National Treasury Employees Union v. FLRA*, 826 F.2d at 122. Disputes over negotiability issues have, in some instances, been treated differently in the federal sector than in the private sector. *E.g.*, *Library of Congress v. FLRA*, 699 F.2d at 1287.

However, in contrast to negotiability disputes where unique federal sector concerns may exist, the duty of fair

representation is one issue where there is a *direct* parallel between the CSRA and private sector labor law, where no unique federal sector concerns are present, and where private sector labor law *should* be imported directly into the CSRA. *See* Brower, 40 OKLA. L. REV. at 392. Under all three of the federal labor statutes (the CSRA, NLRA and RLA), the individual employee's relationship with his exclusive representative is virtually identical. Under all three of the federal labor statutes Congress has granted unions the same extraordinary powers to exclusively represent even the most unwilling employee. *Compare* 29 U.S.C. § 159(a) *and* 45 U.S.C. § 152 Fourth *with* 5 U.S.C. § 7111.

Given this Court's long-held view that this union-employee "exclusivity" arrangement mandates a judicially enforceable duty of fair representation under the NLRA and RLA, *DelCostello*, 462 U.S. at 165, n.14, *citing Vaca*, 386 U.S. at 177, and *Steele*, 323 U.S. at 192, the same must hold true where the CSRA grants equivalent exclusive representation powers to federal employee unions. Indeed, as this Court recognized in *Vaca*, the very constitutionality of the congressional grant of exclusive representation is called into question without the existence of unconditional judicial remedies for injured employees. *Vaca*, 386 U.S. at 183, *citing Steele*, 323 U.S. at 198-99.

As this case demonstrates, the congressionally-sanctioned exclusive representation power under the CSRA, 5 U.S.C. § 7111, carries with it the same pitfalls and possibilities for abuse that exist under the NLRA and RLA. *See Karahalios III*, JA at 80. Karahalios was not a member of respondent NFFE. Yet he was forced to accept that union's exclusive representation, whether he

approved or not. Through its grant of exclusive representation, Congress subjected Karahalios to a regime which ill served him at best, and was hostile to him at worst. This was a forced relationship over which Karahalios had no control. This situation is identical to that faced by private sector employees, who depend upon the federal courts to protect their rights.

Accordingly, there is no reason to treat a federal sector employee injured by his exclusive representative any differently than a similarly injured private sector or railway sector employee. His relationship with his exclusive representative is identical. The union in each case has been clothed with equivalent powers that can make or break the employee and his career. Protection from abuse of that power cannot be made to depend upon the fortuity of the identity of the employer when it is the relationship between the union and the individual employee which is at the heart of the duty of fair representation and which is identical under each federal labor statute. Nor should the federal employee's quest for redress end with the unreviewable discretion of the FLRA General Counsel, while a similarly situated private employee has open access to the federal courts.

Additionally, there is another fundamental reason to treat employees under the CSRA similarly to those under the NLRA and RLA: many of the unions which represent employees under the NLRA and RLA also represent federal sector employees under the CSRA.[9]

[9] For instance, the International Association of Machinists and Aerospace Workers, AFL-CIO, a union long involved with employees under both the RLA and the NLRA, also represents federal employees under the CSRA. *See, e.g., Local Lodge 830, International Association of*
(continued)

It would be anomalous indeed for Congress to immunize arbitrary or discriminatory union conduct occurring under the CSRA, when the identical conduct by the same union would result in substantial liability under the NLRA or RLA. It makes little sense to have the enforcement of an employee's duty of fair representation rights depend upon the vagaries of who his employer is, particularly when his exclusive representative may well be operating concurrently under all three labor statutes, and presumably owes the same duty of fair representation under each statute.

In short, the federal employee is subjected to the same potential for abuse by his exclusive representative as employees in the private sector. Nothing in the CSRA changes the demonstrable needs of federal employees who may be saddled with a hostile, arbitrary or discriminatory exclusive representative.

B. THE UNREVIEWABLE DISCRETION OF THE GENERAL COUNSEL OF THE FLRA TO ISSUE, DECLINE TO ISSUE, OR SETTLE UNFAIR LABOR PRACTICE COMPLAINTS MANDATES AN AVENUE OF JUDICIAL REVIEW FOR AGGRIEVED FEDERAL EMPLOYEES.

Machinists and Aerospace Workers v. U.S. Naval Ordnance Station, Louisville, Kentucky, 20 F.L.R.A. 848 (1985), *enforced*, 818 F.2d 545 (6th Cir. 1987). Other largely private sector unions are also active in the federal employee sector. *See U.S. Army Field Artillery Center, Fort Sill, Oklahoma, and International Brotherhood of Teamsters Local 886*, 17 F.L.R.A. 1078 (1985); *Department of Transportation and United Transportation Union*, 16 F.L.R.A. No. 83 (1984); *Veterans Administration and Service Employees International Union, Local 73*, 16 F.L.R.A. No. 1 (1984); *International Brotherhood of Electrical Workers, Local GCC 1 and Department of Energy*, 17 F.L.R.A. No. 9 (1985).

The General Counsel of the FLRA, like his counterpart at the NLRB, has unreviewable discretion to issue, or decline to issue, unfair labor practice complaints. *Turgeon*, 677 F.2d at 940; *cf. Reed v. Collyer*, ____ U.S. ____, 108 S. Ct. 2885 (1988) (Scalia, J., dissenting). This unreviewable discretion presumably also includes the power to settle unfair labor practice complaints once issued, *even over the objection of the party most affected. NLRB v. United Food and Commercial Workers*, ____ U.S. ____, 108 S. Ct. 413, 422 (1987). It is the unique nature of this unreviewable discretion which so troubled this Court in *Vaca* and which is so very troubling in the instant case. As this Court recognized in *Vaca*, the administrative agency's interest is in "effectuating the policies of the federal labor laws, not the wrong done to the individual employee ...." 386 U.S. at 182, n.8.

As shown by the instant case, the FLRA General Counsel's unreviewable discretion strips the employee of an unconditional ability to protect his rights, and instead makes the enforcement of those rights dependent upon a "prosecutorial" official whose mandate does not necessarily include the redress of each individual employee's injury. The administrative process thus permits injured employees with valid claims to "fall through the cracks," and receive no redress. It is these employees, like Karahalios, who must have access to federal court.

Karahalios clearly "fell through the cracks" of the administrative system. Despite an ultimate finding by the district court that the respondent union had breached its duty to Karahalios in *three separate ways*, JA at 91-92, the General Counsel refused to seek redress for him, preferring instead to settle for a "notice-posting" remedy.

The remedy chosen by the FLRA benefited the bargaining unit in general, but was completely ineffectual as to Karahalios. The effect upon Karahalios of the loss of his job—a job in which he was performing competently and satisfactorily—together with his concomitant loss of pay, prestige and retirement benefits, was not addressed in any fashion by the FLRA. Thus, the courts must remain open to provide a remedy for an injured federal employee.

C. THE COURTS HAVE LONG DEVELOPED THE SUBSTANTIVE DUTY OF FAIR REPRESENTATION LAW. THUS, CONTRARY TO THE SUGGESTION OF THE SOLICITOR GENERAL, THERE IS NO REASON TO DEFER TO THE FLRA IN DUTY OF FAIR REPRESENTATION CASES.

The Solicitor General contends that the courts should defer to the FLRA in its handling of duty of fair representation cases based on the premise that FLRA is more familiar with reviewing arbitration awards. Citing a policy of "avoidance of conflicting rules and reliance on administrative expertise," the Solicitor General asserts that Congress intended to eliminate federal court jurisdiction over duty of fair representation claims. *See* Brief of the United States, pp. 15-16. This argument is defective.

The Solicitor General ignores the fact that this exact argument was made and specifically rejected in *Vaca*. 386 U.S. at 180-81. The Solicitor General has advanced no reason to depart from *Vaca*'s rationale in this case. The courts, not the FLRA, have created, developed and refined the contours of the duty of fair representation for

the forty years since *Steele* was decided. The courts, not the administrative agencies, have always had primacy in developing the substantive body of duty of fair representation law. *See National Treasury Employees Union v. FLRA*, 800 F.2d at 1169-71 (court of appeals overturns FLRA departure from established duty of fair representation law). Nothing in the CSRA changed this. While Congress may have intended that the courts defer to the FLRA on issues within its administrative expertise, *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. at 97-98, Congress never evinced any intent to have the FLRA create a new, different, or primary body of substantive duty of fair representation law for the federal sector.

Indeed, at least one court of appeals has indicated that Congress' silence on such an important matter demonstrates congressional adoption in the CSRA of the private sector precedent which had arisen under the NLRA and RLA. *National Treasury Employees Union v. FLRA*, 800 F.2d at 1171 ("... if Congress were changing rather than adopting a well-known body of case law, one would expect mention of that intention somewhere in the legislative history .... we are aware of, nothing of that sort."). *See also Pham*, 799 F.2d at 638-39. Thus, contrary to the position advanced by the Solicitor General, this Court should not create in the CSRA an exception to over forty years of precedent concerning judicial enforcement of the duty of fair representation, particularly where Congress has given no affirmative guidance on the issue.

Moreover, while the Solicitor General asserts that the FLRA has been particularly active in providing remedies for duty of fair representation cases (Brief of the United States, p. 15), others have criticized the FLRA for not enforcing the duty of fair representation vigorously enough. Broida, *Fair Representation for Federal Employees: An Overview*, 30 FED. BAR NEWS & J. 440, 442 (1983). Certainly in this case, where there were *three* separate breaches of the duty of fair representation, but no attempt by the FLRA to consider the harm done to the individual employee, it would seem that the FLRA's efforts fell well short of the mark set by this Court in *Vaca* and *Bowen* ("Of paramount importance is the right of the employee ... to be made whole.") *Bowen*, 459 U.S. at 222.

Finally, the Solicitor General argues that the CSRA's grant of exclusive representation powers to the union does not deprive the employee of any substantial pre-existing rights. Brief of the United States, p. 16. The Solicitor General is in error. By incorporating the NLRA model in the CSRA, Congress reduced or eliminated traditional individual employee civil service appeal rights and made an explicit commitment to protecting unionized federal workers through their exclusive bargaining representative. H.R. CONF. REP. NO. 1717 at 157; S. REP. NO. 969 at 10; 5 U.S.C. § 7121(a)(1); *Espenschied v. MSPB*, 804 F.2d 1233, 1236 (Fed. Cir. 1986), *cert. denied*, 107 S. Ct. 1896 (1987); *Moreno v. MSPB*, 728 F.2d 499, 500 (Fed. Cir. 1983). As this Court has noted, "[a] leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action . . . " *United States v. Fausto*, 108 S. Ct. at 671, *citing* S. REP. NO. 969 at 3. Moreover, the legislative history indicates that the NLRA model of greater union power over federal labor relations was a direct result of Congress' concern for effective govern-

ment. *E.g.*, Message of Pres. Carter on Civil Service Reform, March 2, 1978, H.R. REP. NO. 1403 at 102; S. REP. NO. 969 at 12. This increased union role was touted as being "more efficient, less time consuming and less formal than the statutory appeals system." 124 CONG. REC. H8468 (daily ed. Aug. 11, 1978) (remarks of Rep. Ford).

Further efficiency and a business-like approach was intended to be gained in this process by having the union serve as a screen for frivolous or non-meritorious employee grievances and appeals. However, this plenary power of the unions over the grievance and arbitration mechanism led the Court in *Vaca* to mandate court jurisdiction over fair representation claims in the private sector. As this Court stated in *Vaca*: "[w]e cannot believe that Congress in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract." 386 U.S. at 186. Since federal employee labor organizations fulfill the same function as in the private sector, the CSRA necessarily contains the corresponding requirement of a judicially enforced duty of fair representation.

CONCLUSION

This Court should not depart from its reasoning in *Steele* and *Vaca*. When the exclusive representation process breaks down in the federal sector, and the exclusive representative breaches its duty of fair representation to the employee not just once, but on three separate occasions, and the FLRA settles the case with the union

without providing a remedy for the employee, the employee should not be left remediless. The doors to the federal courthouse should not be barred to him, any more than to the plaintiffs in *Steele*, *Vaca*, or *Bowen*.

Congress intended no different result. Congress' silence on duty of fair representation issues should not be read as an implied repeal of the holdings in *Steele* and *Vaca*. If Congress had intended to create an exception to this forty-year line of critical precedent, some discussion would have ensued.

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed, and the case remanded for determination of the merits of the appeals and cross-appeals.

Respectfully submitted,

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August 19, 1988

STATUTORY APPENDIX

5 U.S.C. § 7114. Representation rights and duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

* * * *

5 U.S.C. § 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in

the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or non-preferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure—

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

(e) The expression of any personal view, argument, opinion or the making of any statement which—

(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

(2) corrects the record with respect to any false or misleading statement made by any person, or

(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

* * * *

5 U.S.C. § 7118. Prevention of unfair labor practices

(a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

(2) Any complaint under paragraph (1) of this subsection shall contain a notice—

(A) of the charge;

(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and

(C) of the time and place fixed for the hearing.

(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

(4)(A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of—

(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period, the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order—

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of an employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

(8) If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.

(b) In connection with any matter before the Authority in any proceeding under this section, the Authority may request, in accordance with the provisions of section 7105(i) of this title, from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or other policy directives issued by the Office of Personnel Management.

* * * *

5 U.S.C. § 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its

designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

In The

Supreme Court of the United States

October Term, 19[illegible]

Efthimios A. Karahalios,
Petitioner,

v.

Defense Language Institute/Foreign Language Center, Presidio of Monterey, and Local 1263, National Federation of Federal Employees,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF [illegible] LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-636

EFTHIMIOS A. KARAHALIOS,
Petitioner,
v.

DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, PRESIDIO OF MONTEREY, and LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES

The citations to the opinions below, the basis for this Court's jurisdiction, and the statutory provisions involved are correctly set forth in petitioner's brief at 1-2 and 1a-11a and are therefore not repeated here.

COUNTERSTATEMENT OF THE CASE

Plaintiff Efthimios Karahalios, petitioner herein, at all times relevant was a Greek language instructor at the Defense Language Institute in Monterey, California

("the Institute"). Respondent Local 1263, National Federation of Federal Employees ("the Union") is the exclusive bargaining representative of the professional employees of the Institute.

In 1976, the Institute created a course developer position. Plaintiff applied for that position as did Simon Kuntelos, another Greek instructor who had worked at the Institute for ten years longer than plaintiff and who had served as a course developer for the Institute from 1963 to 1971, when the Institute abolished the position solely as the result of a reorganization. Plaintiff was tested for the course-developer position and received a score of "81"; Kuntelos declined to take the test in protest over the fact that, although listed as the "best qualified" candidate, he had not been permitted to return on a non-competitive basis to the position he had held previously. As the only person to complete the competitive selection process, plaintiff won the position.

Kuntelos filed a grievance alleging that the Institute had violated the collective bargaining agreement and the applicable personnel regulations by failing to award the course developer job to him non-competitively. In August, 1977, an arbitrator sustained the grievance in part and ordered that the position be declared vacant.

Following the arbitral award, the Institute proceeded to refill the position; in that connection Kuntelos agreed to take the test that plaintiff had taken previously, with the understanding that if Kuntelos scored 85 or above, he would be the only employee referred to the selecting official. Because the Institute had altered the promotion selection procedures since plaintiff had taken the test, Kuntelos was allowed more time to complete the test than plaintiff had been afforded. Kuntelos did not obtain a score of 85, however, and both Kuntelos and plaintiff were referred to the selecting official. In May, 1978, the Institute awarded the course developer position to Kuntelos and reduced plaintiff's rank to the instructor position he had held previously.

In response to Kuntelos' selection, plaintiff filed two grievances protesting the process by which Kuntelos had been selected and seeking the opportunity to be reconsidered for the course developer position. The Union sought the advice of its legal counsel with respect to plaintiff's grievances and was advised that the Union had a conflict of interest in prosecuting those grievances in light of the Union's prior, successful representation of Kuntelos. Based on that advice, in January, 1979, the Union Executive Board decided not to appeal the grievances to arbitration.

Four months after learning of the Union's decision, plaintiff filed unfair labor practice charges with the Federal Labor Relations Authority ("FLRA") alleging that the Institute had breached the collective bargaining agreement and that the Union had violated its duty of fair representation under § 7114(a)(1) of the Civil Service Reform Act of 1978, 5 U.S.C. § 7114(a)(1) ("CSRA"). While those charges were pending before the General Counsel of the FLRA, the Institute again eliminated the course-developer position and Kuntelos was reassigned back to an instructor position.

In June, 1980, the FLRA General Counsel decided to issue a complaint against the Union premised on the view that insofar as the Union had based its decision not to arbitrate plaintiff's grievance "on considerations unrelated to the merits of the . . . grievance . . . the [Union's] conduct was . . . inconsistent with its representational responsibilities." J.A. 42. The General Counsel declined to issue a complaint against the Institute.

Upon receiving notice of the General Counsel's decision, the Union entered into a settlement with the FLRA Regional Director pursuant to which the Union agreed that in the future, "where two or more employees are seeking one position" the Union would not refuse to "represent all such employees." J.A. 46. The settlement did

not provide any monetary relief to plaintiff. Plaintiff appealed the settlement to the General Counsel who rejected the appeal.

Approximately one year after the settlement was reached, plaintiff commenced this action, alleging that "[b]y refusing to arbitrate plaintiff's grievance" the Union had "breached its duty of fair representation" and the Institute had "breached the collective bargaining agreements." J.A. 11. The district court ruled that plaintiffs' claim against the Institute for breach of contract was not judicially cognizable, but that the claim against the Union was.

Following a trial on the merits, the district court found that the Union had violated its duty of fair representation, but further ruled that plaintiff was not entitled to back pay as "the court would merely be speculating if it ruled that plaintiff would have retained the course developer job and earned additional pay and benefits had the Union . . . assessed the merits of his grievances in ruling on his own arbitration request." J.A. 96. The sole recovery awarded to plaintiff was the "fees and costs he incurred in his litigation against [the Institute]" which were awarded to plaintiff as "'damages,'" and the "fees and costs he incurred in his suits against the Union" which were awarded under the "'common benefit rationale.'" J.A. 97, 99. In total, the Union was required to pay $35,000.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the judgment in plaintiff's favor. That court concluded that because the CSRA creates an express duty of fair representation and an express *administrative* cause of action for breach of that duty, it is inappropriate for the courts to imply a judicial fair-representation action under the Act. As Judge Noonan put it in his opinion for the Court, Congress, in creating a fair-representation duty under the CSRA had "tempered the remedy" and that therefore "[j]udicial crea-

tivity was restrained. We must act within the statutory scheme."

In light of the conflict among the circuits on this issue, on June 6, 1988, this Court granted plaintiff's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

A. Title VII of the Civil Service Reform Act, in terms, imposes a duty of fair representation on federal sector unions, and that Title creates an express *administrative* cause of action to enforce that duty. There is no provision in the Act creating a *judicial* remedy for breaches of the fair-representation duty. The question posed here is whether the Court should imply such a cause of action. Pp. 8-10 *infra*.

B. A long line of cases in this Court establish that the answer to that question turns on congressional intent. Furthermore, in ascertaining that intent, this Court has stressed that where Congress has expressly created certain remedies to enforce a statutory duty, the logical conclusion—absent strong, contrary evidence—is that Congress provided all of the remedies the Legislature considered appropriate and did not intend other remedies not set forth in the statute. That principle is dispositive here in light of the express provision in CSRA Title VII addressed to the question of remedies. Pp. 10-13 *infra*.

Two additional considerations militate against implying a judicial remedy under CSRA Title VII for breach of that Title's duty of fair representation.

First, unlike the statutes that have been involved in the Court's other implied cause-of-action cases, the CSRA was passed *after* this Court had made plain that the question of whether there should be an implied right of action to enforce a particular statutory duty is one for Congress to resolve rather than the judiciary; the fact that, against that background, Congress created an ad-

ministrative remedy but not a judicial remedy is thus especially significant here. Pp. 13-14 *infra*.

Second, implying a judicial fair-representation remedy under CSRA Title VII would undercut that Title's carefully developed enforcement scheme. The bulk of fair-representation litigation involves challenges to a union's handling of grievances under a collective bargaining agreement, and to adjudicate such challenges the courts often are required to decide the merits of the underlying grievance. But in enacting CSRA Title VII, Congress decided—following extensive debate and as the result of a carefully-struck compromise between contending forces—to foreclose the courts from interpreting federal-sector collective bargaining agreements. Pp. 14-20 *infra*.

C. Petitioner bases his entire argument on the fact that this Court has implied a judicial fair-representation cause of action under two other labor relations statutes, the Labor Management Relations Act ("LRMA") and the Railway Labor Act ("RLA"). Petitioners' reliance on those lines of authority is doubly flawed.

First, there is no reason to believe that Congress intended, in enacting CSRA Title VII, to follow the RLA and LMRA implied-cause-of-action law. In enacting that Title Congress was, of course, wholly free to create a civil remedy to enforce the duty of fair representation which Congress created, or, alternatively to provide an exclusively administrative procedure to enforce that duty. And the RLA and LMRA case law is unhelpful in determining which course Congress intended. Although CSRA Title VII adopts certain basic concepts from the LMRA, the former statute was in no sense copied from the latter, and the similarities between CSRA Title VII and the LMRA are, on the whole, dwarfed by their differences. In fact, CSRA Title VII differs from the LMRA and RLA in three respects directly relevant here: CSRA Title VII creates an express duty of fair repre-

sentation, establishes an express administrative cause of action to enforce that duty, and channels virtually all litigation under federal sector collective bargaining agreements to the administrative agency. Pp. 20-24 *infra*.

Second, even if there were reason to believe that Congress intended the courts to follow the RLA and LMRA implied-cause-of-action case law in interpreting CSRA Title VII, those cases would not have led the 1978 Congress to believe that it was unnecessary to create an express judicial fair-representation remedy if such an action were intended. The lesson taught by *Steele v. L. & N. R. Co.*, the RLA case which is the fountainhead of fair-representation law, and *Syres v. Oil Workers*, in which the Court first recognized a judicial fair-representation cause of action under the LMRA, is that such a remedy will be implied in the *absence* of an administraitve remedy, and *not* where, as here, an express administrative remedy exists. And all that *Vaca v. Sipes*, on which petitioner so heavily relies, adds is that the creation of an administrative remedy *after* a judicial remedy is in place will not suffice to displace the pre-existing judicial remedy. Petitioner's attempt to derive a far more sweeping lesson from *Vaca* ignores both the context in which that case was decided, and the reasoning of the decision. Pp. 24-37 *infra*.

ARGUMENT

THE CIVIL SERVICE REFORM ACT DOES NOT GIVE RISE TO A JUDICIAL REMEDY FOR BREACH OF THE DUTY OF FAIR REPRESENTATION

The issue in this case is whether Title VII of the Civil Service Reform Act gives rise to an implied judicial—in addition to an express administrative—remedy to enforce the duty of fair representation which that Act imposes on unions acting as exclusive bargaining representatives. "The question of the existence of a statutory cause of action is, of course, one of statutory construction." *Touche Ross & Co. v. Redington, Trustee*, 442 U.S. 560, 569 (1979). "[A]s with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself." *Id.*

A. CSRA Title VII § 7114(a)(1) provides that

> A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents, and is entitled to act for and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

Section 7116(b)(8), 5 U.S.C. § 7116(b)(8), in turn, provides that "it shall be an unfair labor practice for a labor organization • • • to otherwise fail or refuse to comply with any provision of this chapter." And § 7118, 5 U.S.C. § 7118, provides for the prosecution of unfair labor practice complaints before, and the adjudication of such complaints by, the FLRA; that section, *inter alia*, empowers the FLRA to order such remedial action as will "carry out the purpose of this chapter," including an award of backpay to be paid by an "agency . . . or

. . . labor organization . . . found to have engaged in the unfair labor practice involved."

Read together, these provisions create an express *administrative* cause of action to enforce the duty of fair representation. As the FLRA has held, "[t]he duty of an exclusive representative to fairly represent all unit employees arises under the second sentence of § 7114(a)(1)." *National Federation of Federal Employees Local 1453*, 23 FLRA 686, 689 (1986).[1] Because CSRA § 7116(b)(8) makes any union violation of Title VII an unfair labor practice, it follows that "section 7116(b)(8) is violated by a labor union's failure to represent the interests of all employees in a bargaining unit without discrimination," *Tidewater Virginia Federal Employees Metal Trades Council*, 8 FLRA 221, 230 (1982). And the General Counsel of the FLRA has not hesitated to seek, nor has the FLRA hesitated to award, full relief to injured employees including, where appropriate, back pay in duty of fair representation actions brought under § 7116(b)(8). *E.g.*, *Machinists Local 39*, 24 FLRA 392

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[1] The FLRA has observed that, "[t]he second sentence of § 7114(a)(1) is virtually identical to the second sentence of § 10(e) of Executive Order 11491, as amended." *NFFE Local 1453, supra*, 23 FLRA at 960. That sentence was interpreted to require federal sector unions "to represent employees without arbitrariness or bad faith." *Id.* "Congress intended the Authority to apply a similar standard under the analogous provision in section 7114(a)(1) of the Statute." *Id.*

Indeed, at the very start of the legislative process that led to the enactment of CSRA Title VII, the House Subcommittee on Civil Service held a special briefing with respect to the status of federal sector labor relations under the Executive Order. *See* Briefing Before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service on the Federal Labor Relations Program, 95th Cong. 1st Sess. (1977). At that briefing, Anthony Ingrassia, the Director of the Office of Labor-Management Relations of the Civil Service Commision, testified in response to a specific question that under the Executive Order "[t]here is a duty of fair representation to all employees in the bargaining unit." *Id.*, at 25.

(1986); *American Federation of Government Employees Local 1857*, 28 FLRA No. 86 (Aug. 21, 1987).

While CSRA Title VII is plain in the foregoing regards, there is *no* provision in that Act creating a *judicial* cause of action to enforce the duty of fair representation. Thus, petitioner's basic claim, which we now address, is that the Court should *imply* such a cause of action from the Act.

B. (1) There was a time when this Court assumed that any statute "enacted for the benefit of a special class" gave rise to a civil remedy "for members of that class." *Merrill, Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 374 (1982). Beginning with its decisions in *Passenger Corp v. Passenger Assn.*, 414 U.S. 453 (1974), and *Cort v. Ash*, 422 U.S. 66 (1975), however, the Court broke with the past and adopted a "decidedly different approach . . . to cause of action by implication," *Cannon v. University of Chicago*, 441 U.S. 677, 698 n.24 (1979).[2]

Under the present approach, the "dispositive question," *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979), and "ultimate issue is whether Congress intended to create a private right of action," *California v. Sierra Club*, 451 U.S. 287, 293 (1981). As the Court reminded just last Term, "unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Thompson v. Thompson*, —— U.S. ——, 56 L.W. 4055, 4057 (January 12, 1988). The Court "will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *Id.*[3]

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[2] *See also Piper v. Chris-Craft Industries*, 430 U.S. 1 (1977); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

[3] *See also Touche Ross & Co. v. Redington, Trustee, supra*, 442 U.S. at 575 ("The central inquiry remains whether Congress intended to create . . . a private cause of action"); *Universities Research Assn. v. Coutu*, 450 U.S. 754, 770 (1981) ("the question here is ultimately one of congressional intent"); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979) (semble); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) ("Our focus . . . is on the intent of Congress"); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984) (same); *Middlesex Cty. Sewerage Auth. v. Sea Clammers*, 453 U.S. 1, 13 (1981) ("The key to the inquiry is the intent of the Legislature"); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985).

Of particular moment here, in resolving the question of congressional intent this Court has repeatedly emphasized that it is an "elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis, supra;* 444 U.S. at 19.[4] That canon reflects this Court's "reluctan[ce] to tamper with an enforcement scheme crafted [by Congress] with . . . evident care," *Massachusetts Mut. Life Ins. Co. v. Russell, supra*, 473 U.S. at 147. And the Court's approach recognizes, as well, that the existence of a "remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies," *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 93 (1981), and makes it "highly improbable that 'Congress absentmindedly forgot to mention an intended private action,'" *Transamerica Mortgage Advisors v. Lewis, supra*, at 20. For both of these reasons, where Congress has expressly addressed the question of remedy "[i]n the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Middlesex Cty. Sewage Auth v. Sea Clammers, supra*, 453 U.S. at 15.

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[4] *See also Middlesex Cty. Sewerage Auth. v. Sea Clammers, supra*, 453 U.S. at 14-15; *Massachusetts Mut. Life Ins. Co. v. Russell, supra*, 473 U.S. at 147.

(2) The instant case is controlled by the foregoing principles.

(a) As we have seen, in enacting CSRA Title VII, Congress treated expressly with the duty of fair representation and with the issue of remedies for violations of duties created by that Title. Thus, § 7114(a)(1) places labor unions under an express duty to "represent[] the interests of all employees in the unit without discrimination." And § 7116(a)(8),(b)(8) makes it an "unfair labor practice"—remediable through the FLRA—for either an agency or labor organization to "fail or refuse to comply with any provision of this chapter." Neither of these provisions has any counterpart in the Labor Management Relations Act of 1947, 29 U.S.C. §§ 151 *et seq* ("LMRA"), even though the unfair labor practices proscribed by CSRA § 7116 are in large measure derived from LMRA § 8(a),(b). Nor is there any analogue to § 7114(a)(1) or § 7116(b)(8) in the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"), our other basic federal labor law.

Rather, CSRA §§ 7114(a)(1) and 7116(b)(8) are unique provisions, crafted specially by Congress for CSRA Title VII. The office of the latter section is to authorize the FLRA to enforce *all* of the duties created by CSRA Title VII, including, of course, the duty of fair representation stated in § 7114(a)(1). That Congress went to such pains to create an administrative remedy for fair-representation violations makes the "assumption of inadvertent omission . . . especially suspect." *Massachusetts Mut. Life. Ins. v. Russell, supra*, 473 U.S. at 146.

(b) *United States v. Fausto*, —— U.S. ——, 56 L.W. 4128 (Jan. 25, 1986) further supports—indeed, in our view, compels—this conclusion. In *Fausto*, a federal employee who had received a thirty day disciplinary suspension filed suit in the Court of Claims pursuant to the Back Pay Act, which in terms creates an entitlement to

back pay for any federal employee found "to have been affected by an unjustified or unwarranted personnel action." 5 U.S.C. § 5596(b)(1). The question presented was "whether the [CSRA], which affords an employee in respondent's situation no review of the agency's decision, precludes such a Claims Court suit." 56 L.W. at 4129. This Court held that the CSRA has such preclusive effect, as the Court was persuaded that Congress had "prescribe[d] in great detail the protections and remedies applicable," and had created an "integrated scheme of administrative and judicial review," *id.* at 4130, and thereby had impliedly " 'repealed' . . . the Back Pay Act's implication allowing review in the Court of Claims of the underlying personnel decision giving rise to the claim for backpay," *id.* at 4132.

In this case, of course, the question is *not* whether Congress intended to foreclose a cause of action created by another federal statute but rather whether Congress intended in CSRA Title VII to *create* a cause of action not spelled out in that law. The comprehensiveness of the CSRA remedial scheme which sufficed to preclude a Back Pay Act claim in *Fausto* at least equally precludes the implication of a new cause of action from the CSRA.[5]

(3) Two additional considerations militate against implying a judicial remedy under CSRA Title VII for breach of that Act's duty of fair representation.

(a) First, unlike the statutes that have been involved in this Court's other implied-cause-of-action cases, Congress passed the CSRA in 1978, *after* this Court, in its seminal decisions in *Passenger Corp. v. Passenger Assn. supra*, and *Cort v. Ash, supra*, had adopted its "decidedly different approach . . . to cause of action by implication,"

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[5] *Cf. also Bush v. Lucas*, 462 U.S. 367, 388 (1983), in which the Court held that the "comprehensive nature of the remedies currently available" to federal employees made it inappropriate for the courts to "create[e] . . . a new judicial remedy" to redress violations of federal employees' constitutional rights.

Cannon v. University of Chicago, supra, 441 U.S. at 698 n.24. Prior to those decisions, as then Justices Rehnquist and Stewart observed in their concurring opinion in *Cannon*, "Congress . . . tended to rely to a large extent on the courts to *decide* whether there should be a private right of action, rather than determining this question for itself" and this Court's decisions "gave Congress good reason to think that the federal judiciary would undertake this task." *Id.* at 717 (emphasis in original). But the Court's "quite different . . . analysis" in *Cort v. Ash, supra*, and its progeny changed all that by "appris[ing] the lawmaking branch of the Federal Government that the ball, so to speak, may well now be in its court." 441 U.S. at 717.

Against that legal background, the fact that Congress, in enacting the CSRA, did create an express administrative remedy for breaches of the duty of fair-representation and did *not* create any judicial remedy precludes an inference that Congress intended both an administrative and a judicial remedy.

(b) Second here, as in *Universities Research Assn. v. Coutu, supra*, "[t]he implication of a private right of action would undercut . . . the [Act's] elaborate administrative scheme." 450 U.S. at 783. To explain why this is so we must first briefly review the nature of fair-representation claims and the structure of CSRA Title VII.

As is true of the instant case, the bulk of fair-representation litigation involves challenges to the manner in which a union has processed a grievance under a collective bargaining agreement. In such litigation, as this Court has held on at least four occasions, the plaintiff "must ordinarily establish both that the union breached its duty of fair representation and that the employer breached the collective bargaining agreement." *Clayton v. Automobile Workers*, 451 U.S. 679, 683 n.4 (1981). *See also Hines v. Anchor Motor Freight*, 424 U.S. 554,

570-71 (1976); *United Parcel Service v. Mitchell*, 451 U.S. 56, 62 (1981); *DelCostello v. Teamsters*, 462 U.S. 151, 165 (1983). This is the governing rule if the plaintiff sues the union, sues the employer or sues both; "the case he must prove is the same whether he sues one, the other, or both." *Id.* Thus, the typical fair-representation claim is necessarily, "'a direct challenge to "the private settlement of disputes"'" under the applicable collective bargaining agreement. *Id.*[6]

In enacting CSRA Title VII, Congress expressly decided *not* to open the courts to such "direct challenges" with respect to agreements negotiated pursuant to that Act or to authorize the courts to decide whether a collective bargaining agreement was breached. The CSRA does *not* contain an analogue to § 301 of the LMRA, 29 U.S.C. § 185, the provision authorizing the federal courts to enforce private-sector collective bargaining agreements. To the contrary, in enacting CSRA Title VII Congress decided *not* to permit the courts to entertain suits to compel arbitration under federal-sector collective agreements, suits which would have necessitated a judicial decision as to whether a grievance falls within an arbitration provision in such an agreement, *see Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960). Congress in enacting CSRA Title VII likewise determined *not* to permit courts to entertain suits to enforce or vacate federal sector arbitral awards, suits which would have necessitated judicial review of arbitral interpretation of federal-sector agreements, *see Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).[7]

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[6] Thus petitioner's claim that "fair representation lawsuits" do not require "examination of the provisions of the [collective bargaining] agreements themselves," Pet. Br. at 32, is untenable.

[7] The House-approved version of the bill that became the CSRA included a section authorizing *direct recourse* to the federal courts in suits to *compel* arbitration. *See* H.R. 11280, 95th Cong. 2d Sess. § 7121(c) (1978), *Legislative History of the Federal Service Labor-*

In lieu of LMRA § 301-type actions CSRA Title VII provides that questions of arbitrability under federal labor contracts are to be resolved by arbitrators and not by the courts, *see* § 7121(a)(1), 5 U.S.C. § 7121(a)(1), and that an employer's refusal to submit an arbitrability issue to arbitration constitutes a breach of Title VII and hence an unfair labor practice under § 7116(a)(8). Congress also provided that, subject to limited exceptions,[8] *all* challenges to arbitral decisions (including decision regarding arbitrability) are to be submitted to the FLRA for decision, *see* § 7122, 5 U.S.C. § 7122. In these respects CSRA Title VII follows the precise model that Congress *rejected* in enacting the LMRA.[9] Moreover, § 7123(a)

Management Relations Statute, Title VII of the Civil Service Reform Act of 1978 at 978 (hereinafter "Leg. Hist."). That provision was rejected in Conference. *See* p. 18, *infra*.

The House bill was in significant measure drawn from a bill introduced by Representative Clay, the Chairman of the House Subcommittee on Civil Service, and a second bill introduced by Representative William Ford, a senior member of that Subcommittee and of the Committee on Post Office and Civil Service, at the start of the Ninety-Fifth Congress. *See* H.R. 13, 95th Cong., 1st Sess. (1978), Leg. Hist. at 121-83; H.R. 1589, 95th Cong. 1st Sess. (1977), Leg. Hist. 189-234. The Ford bill, as introduced, provided access to the courts not only to compel arbitration but also to enforce arbitral awards, *see* H.R. 1589, § 8, Leg. Hist. at 212-13; that proposal did not survive Committee consideration.

[8] Under CSRA Title VII § 7122(d), (f), where challenges to personnel actions based on unacceptable performance or to adverse actions are raised under a contractual grievance procedure—rather than appealed to the Merit Systems Protection Board ("MSPB") pursuant to the statutory appeal mechanism created by the CSRA, *see* 5 U.S.C. §§ 4303, 7512—the arbitrator's decision may be appealed directly to the MSPB if a claim of discrimination is involved or the arbitrator's decision may be appealed to court (rather than to the FLRA) in the same manner as a decision by the MSPB, *see* 5 U.S.C. § 7703.

[9] The Court reviewed the pertinent LMRA legislative history in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), explaining

(1), 5 U.S.C. § 7123(a)(1), precludes *any judicial review whatsoever* of decisions by the FLRA in matters "involving an award by an arbitrator."[10] Congress, then, could not have been clearer in signifying its intent to foreclose the courts from deciding under the CSRA the type of contract issues that necessarily would be raised if a civil remedy for breach of the duty of fair representation were implied from that Act.

Congress' decision to thus circumscribe the role of the courts under CSRA Title VII was, moreover, the product of extensive debate and an ultimate compromise between contending forces. "Prior to the enactment of Title VII, labor-management relations in the federal sector were governed by a 1962 Executive Order" which was "administered by the Federal Labor Relations Council, a body composed of three Executive Branch management officials whose decisions were not subject to judicial review." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 91 (1982). During the legislative process that led to the passage of the CSRA, the Carter Administration urged Congress to continue that basic structure by enacting a law under which decisions of the FLRA "on any matter within its jurisdiction shall be final and

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that in the 1947 Congress which enacted the LMRA, the House had passed a bill which would have made it a violation of the duty to bargain to fail to follow an agreed-upon grievance-arbitration procedure, and the Senate had passed a bill which would have made it an unfair labor practice to violate a collective agreement or an agreement to submit a dispute to arbitration. *See id.* at 452, n.8. "This feature of a law was dropped in Conference," as the Conference Committee decided to leave contract enforcement " 'to the usual process of the law and not to the National Labor Relations Board.' " *Id.* at 452, *quoting* H.R. Rep. No. 510, 80th Cong. 1st Sess. 42 (1947).

[10] Petitioner is thus simply wrong in asserting that "in enacting the CSRA Congress intended to adopt the same basic framework for resolving collective bargaining disputes as existed in the private sector." Pet. Br. at 21.

conclusive" and not subject "to review . . . by an action in the nature of mandamus . . . or by any other means." [11]

The House rejected the Carter Administration's entreaties and passed a bill which provided for judicial review of all FLRA decisions, including decisions on exceptions from arbitration awards; in addition, as previously noted, the House bill provided for direct access to the courts in actions to compel arbitration. *See* H.R. 11280, *supra*, §§ 7121(c), 7123, Leg. Hist. 978, 979.[12] In contrast, the Senate passed a bill which contained *no* authorization for suits to compel arbitration, and which provided that except for arbitral decisions involving personnel actions based on unacceptable performance or involving other adverse actions, challenges to arbitral awards were to be submitted to the FLRA for *final* decision; under that bill, only FLRA decisions covering

[11] The Carter Administration proposal was introduced by Senator Ribicoff as Amendment 2084 to S.2640, 95th Cong. 2d Sess. (1978), a bill embodying the Carter Administration's recommendations for civil-service reform which Senator Ribicoff had introduced at the Administration's request. *See* Leg. Hist. at 1006-08. The quote in text is from § 7164(k) of Amendment 2084, Leg. Hist. 458. *See also* § 7171(j) of the Amendment, Leg. Hist. 473, precluding review of FLRA decisions on exceptions to arbitration awards.

[12] The version of CSRA Title VII adopted by the House was first proposed by Representative Udall, the ranking member of the Post Office and Civil Service Committee, as a substitute for Title VII of the bill reported by the Post Office and Civil Service Committee. *See* Leg. Hist. at 907-22, 962.

In approving that amendment, the House rejected an alternative substitute amendment offered by Representative Collins and "reflect[ing] what I understand to be the administration's position on codifying our present Executive Order program of labor-management relations," Leg. Hist. 906. Under the Collins amendment, as under the Carter administration bill, decisions of the FLRA were to be "final and conclusive" and not subject to judicial review. *Id.* at 897. Representative Collins referred to this as one of "the four major places where my amendment differs from the Udall substitute," and termed the dispute over judicial review a "major concern." Leg. Hist. at 935, 936.

matters not growing out of a collective agreement would have been subject to judicial review. *See* S. 2640, *supra*, §§ 7204(1), 7216(f), 7221(j), (k), Leg. Hist. at 571, 584-85, 596-97.[13]

In conference, the differences between the House and Senate bills with respect to the role of the courts under CSRA Title VII emerged as a major issue in dispute. Senator Ribicoff identified this as one of a handful of "serious problems" the Senate had with the House's approach.[14] To break an emerging deadlock Representative Udall, the chairman of the conference, offered a compromise proposal under which the Senate would agree to the bulk of the House's version of CSRA Title VII, but the House would accept the Senate's decision to keep the courts essentially out of the business of considering disputes under collective bargaining agreements by foreclosing access to the courts either to compel arbitration or to obtain review of FLRA decisions on exceptions to arbitral awards.[15] The Senate conferees accepted that proposal which was then enacted into law. *See* CSRA

[13] The Senate Committee on Governmental Affairs had reported out a bill which largely followed the Carter Administration's proposal, including its recommendation to preclude all judicial review of FLRA decisions. *See* S. 2640, *supra*, §§ 7204(1), 7221(j), Leg. Hist. 513-14, 536. On the floor of the Senate, Senators Ribicoff and Percy, as the managers of the bill, accepted an amendment by Senator Stevens to provide for judicial review of FLRA decisions in unfair labor practice proceedings. Leg. Hist. 1036-38.

[14] The meetings of the conference committee were officially transcribed; the transcripts are available, *inter alia*, from the Merit Systems Protection Board. The quote in text is from the transcript of the conference meeting of September 27, 1978, p. 18.

[15] *Id.* at 46-55. The House also agreed to foreclose judicial review of FLRA decisions in representation proceedings. The Senate, in response, agreed to permit arbitrators to resolve all arbitrability disputes, rather than leaving some for decision by agency heads. Thus, petitioner's assertion that the judicial-review provisions of the "Udall substitute essentially became 5 U.S.C. § 7123(a) and (b)," Pet. Br. at 25 n.6, is incorrect.

Title VII §§ 7121(a)(1), 7123, 5 U.S.C. §§ 7121(a)(1), 7123.[16]

(4) In sum, this is the last case in which a civil remedy should be implied. Acting at a time when Congress knew that the Legislative Branch was responsible for shaping the appropriate remedies for its enactments, Congress elected to create an express *administrative* remedy for breach of the duty of fair representation, and left no hint of any intent to create a judicial cause of action as well. And implying such a cause of action—and thereby empowering the courts to decide the meaning of federal-sector collective agreements in the context of adjudicating fair-representation claims—would be directly contrary to the judgments Congress made in framing CSRA Title VII.

C. Petitioner makes no attempt to identify anything in CSRA Title VII or its history to support an implied cause of action here. Instead, petitioner bases his entire argument on the fact that this Court has implied a judicial fair-representation cause of action under two *other* labor relations statutes, the RLA and the LMRA. Petitioner's reliance on those lines of authority is entirely misplaced.

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[16] Petitioner goes to great pains, *see* Pet. Br. at 26-30, to prove that the absence of a CSRA analogue to LMRA § 301 does not preclude federal-court jurisdiction over fair-representation suits under the CSRA. We agree; federal-question jurisdiction under 28 U.S.C. § 1331 extends to any cause of action implied from a federal law.

What petitioner fails to realize, however, is that what is at issue here is *not* the existence *vel non* of federal *jurisdiction* but rather whether Congress, in enacting the CSRA, intended to create a judicial (as opposed to administrative) *cause of action* to enforce that Act's duty of fair-representation. And as explained in text, the absence of a CSRA analogue to LMRA § 301, and the judgments Congress made in crafting the CSRA regarding the appropriate role of the courts under that Act, are highly probative in assessing Congress' intent on this issue.

(1) At the threshold, it is important to bear in mind that in enacting CSRA Title VII Congress was wholly free to create a civil remedy to enforce that Title's duty of fair representation or, alternatively, to provide an exclusively administrative procedure to enforce that duty. There is no law of nature, nor any rule of law, that requires that legislatively-created duties be enforceable through the judicial, rather than the administrative, process.

As *Bush v. Lucas*, *supra*, teaches, the vindication of even *constitutional* rights may be confined to an administrative procedure, including a procedure that "provide[s] a less than complete remedy for the wrongs," 462 U.S. at 373. Moreover, the premise of the implied cause-of-action doctrine is that only some—rather than all—legal duties are judicially enforceable; the very point of the doctrine is to assure that *Congress* decides whether to create a judicial remedy for the rights and duties stated in federal enactments, and that the courts confine themselves to ascertaining Congress' intent in that regard. *See* pp. 12-14 *supra*.

Thus, the RLA and LMRA decisions on which petitioner relies are relevant here only insofar as those decisions were part of "the historical context" in which the CSRA was enacted, *California v. Sierra Club*, *supra*, 451 U.S. at 296-97, and shed light on the intent of the 1978 Congress that passed the CSRA. In particular, the relevant question with respect to those decisions is whether the 1978 Congress must have assumed from the decisions implying a judicial remedy for fair representation claims under the RLA and the LMRA that such a remedy would be implied from the CSRA as well.

(2) In addressing that question, it is worthy of emphasis that, although CSRA Title VII adopts certain concepts from the LMRA, this is *not* a case in which Congress proceeded by simply borrowing the text of a pre-existing statute, thereby producing "two statutes us[ing]

identical language," *Cannon v. University of Chicago*, *supra*, 441 U.S. at 695. Rather, every section—and, indeed, virtually every sentence—of CSRA Title VII, was drafted specifically for the CSRA (by congressional committees which do not even have jurisdiction over the LMRA), drawing far more extensively from the language of the Executive Order which had governed federal sector labor-management relations, *see* p. 17, *supra*, than from the LMRA. Even where Congress adopted a principle from the LMRA, unique language was drafted to incorporate that principle into CSRA Title VII and some of the particulars of the LMRA scheme were altered in the process.[17]

Moreover, the similarities between CSRA Title VII and the LMRA are, on the whole, dwarfed by their differences. For example, under the CSRA unions and employers bargain only over "conditions" of employment but *not* over wages or hours, *see* 5 U.S.C. § 7103(a)(11), and not over the multiple subjects that fall within the CSRA's "management rights" provisions, 5 U.S.C. § 7106; in contrast, LMRA § 8(d), 5 U.S.C. § 158(d), requires bargaining over "wages, hours, and other terms and conditions of employment," and largely leaves it to the parties to decide in bargaining the scope of management's rights. Similarly CSRA Title VII proscribes

[17] For example, like the LMRA—and unlike the Executive Order—CSRA Title VII vests enforcement powers in an independent administrative agency and independent general counsel. But CSRA §§ 7104-05, 5 U.S.C. § 7104-05, the provisions establishing the FLRA and its General Counsel, read quite differently from LMRA §§ 3-6, 29 U.S.C. §§ 153-56, the comparable sections in the LMRA. And indicative of the fact that, in crafting the CSRA, Congress did not follow the LMRA by rote, the CSRA provides for a smaller administrative agency than the LMRA, *compare* 5 U.S.C. § 7104(a) (FLRA consists of three members) *with* 29 U.S.C. § 153(a) (five-Member NLRB to replace three-member agency provided for by Wagner Act); and grants the General Counsel a longer term in office, *compare* 5 U.S.C. § 7104(f)(1) (five-year term) *with* 29 U.S.C. § 153(d) (four-year term).

strikes, slowdowns and picketing which "interferes with an agency's operations," 5 U.S.C. § 7116(b)(7), and instead provides a system for binding arbitration of issues unresolved in collective bargaining, *see* 5 U.S.C. § 7119; under the LMRA, "the use of economic pressure . . . is part and parcel of the process of collective bargaining," *Labor Board v. Insurance Agents*, 361 U.S. 477, 494 (1960), and the right to strike is specifically protected by statute, *see* LMRA § 13, 29 U.S.C. § 163. And CSRA Title VII imposes a host of duties on federal employers that the LMRA leaves to the collective bargaining process: *e.g.*, the duty to honor employee requests to have union dues deducted from their pay, 5 U.S.C. § 7115; the duty to grant union representatives official time off for purposes of participating in collective bargaining negotiations, 5 U.S.C. § 7131; and the duty to agree to a grievance procedure, 5 U.S.C. § 7121.

Against this background, it is plain that just as decisions under the LMRA "cannot be imported wholesale into the railway labor arena," *Railroad Trainmen v. Termial Co.*, 394 U.S. 369, 383 (1969), decisions under the LMRA and RLA cannot be imported wholesale into the CSRA. "Even rough analogies must be drawn circumspectively, with due regard for the many differences between the statutory schemes." *Id.*

This caution is particularly to the point in this case because the enforcement scheme of CSRA Title VII differs from the structure of the LMRA (and RLA) in at least three respects directly relevant here. *First*, the CSRA creates an express duty of fair-representation; in contrast, the RLA and LMRA fair-representation duties have been judicially implied from those laws. *Second*, as we have seen, the CSRA includes an express administrative cause of action to enforce the fair-representation duty; neither the RLA nor the LMRA contains any such provision. *Third*, the CSRA channels virtually all litigation under federal sector collective bargaining agreements

to the FLRA; under the LMRA and the RLA such litigation is channeled to the courts.

Given these differences, and given the fact that Congress enacted the CSRA after this Court had adopted its "decidedly different approach to cause of action by implication," p. 12, *supra*, there is no reason to believe that Congress intended, in enacting CSRA Title VII, to follow the RLA and LMRA implied-cause-of-action case law. Rather, the differences in the statutes—and in the times of their enactment—point to precisely the opposite conclusion.

(3) Even if, *arguendo*, there were reason to believe that Congress in shaping CSRA Title VII intended the courts to follow the RLA and LMRA implied-cause-of-action case law in interpreting CSRA Title VII, that would not carry the day for petitioner. For a detailed review of those cases and their rationale demonstrates that the law at the time provided *no* basis for implying a judicial fair representation remedy where Congress has created an express administrative remedy.

(a) *The RLA Cases. Steele v. L. & N. R. Co.*, 323 U.S. 192 (1944), is the fountainhead of the duty of fair representation jurisprudence. The threshold question in that case was "whether the Railway Labor Act imposes on a labor organization, acting by authority of the statute as exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination because of their race." *Id.* at 193. The Court, persuaded that such a duty was fairly "implied from the statute and the policy which it has adopted," *id.* at 204, answered that question in the affirmative:

> Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, but it has also imposed on the representative a corresponding duty. We hold that the language of the Act . . . read in light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them. [*Id.* at 202-03]

Having found a fair-representation duty in the RLA, the Court then turned to the "question . . . whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation." *Id.* at 193. The Court began its analysis by observing that RLA fair-representation claims did not raise representational issues "which have been relegated for settlement to the Mediation Board," nor were such claims "committed to the jurisdiction of the Railroad Adjustment Board." *Id.* at 205. "*In the absence of any available administrative remedy*," the Court reasoned, "the right here asserted . . . is of judicial cognizance." *Id.* at 207 (emphasis added). The Court added:

> That right would be sacrificed or obliterated if it were without the remedy which the courts can give for breach of such a duty or obligation . . . . [T]he statutory provisions which are in issue are stated in the form of commands. *For the present command there is no mode of enforcement other than resort to the courts*, whose jurisdiction and duty to afford a remedy for a breach of statutory duty are left unaffected. The right is analogous to the statutory right of employees to require the employer to bargain with the statutory representative of a craft . . . and like it is one *for which there is no available administrative remedy*. [*Id.*; emphasis added.] [18]

[18] In *Tunstall v. Brotherhood*, 323 U.S. 210, 213 (1944), a companion case to *Steele*, the Court held that the cause of action that *Steele* had implied from the RLA is one "arising under a law regulating commerce of which the federal courts are given jurisdiction." (That question was not decided in *Steele* because *Steele* came to this Court from a state court, and thus the only jurisdictional issue raised there concerned the scope of this Court's jurisdiction to review state-court judgments.)

The Court elaborated on the teaching of *Steele* in *Railroad Trainmen v. Howard*, 343 U.S. 768 (1952). That case was brought by a black employee who claimed that the defendant union had discriminated against black porters all of whom were excluded from the bargaining unit that the union represented. After finding that the RLA imposed a duty on unions to refrain from the type of discrimination alleged in the complaint, the Court addressed the remedy issue and stated:

> Here, as in the *Steele* case, colored workers must look to a judicial remedy to prevent the sacrifice or obliteration of their rights under the Act. For *no adequate administrative remedy can be afforded by the National Railroad Adjustment or Mediation Board.* The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board . . . Nor does the dispute hinge on the proper craft classification of the porters so as to call for settlement by the National Mediation Board . . . Our conclusion is that the District Court has jurisdiction and power to issue necessary injunctive orders . . . [343 U.S. at 774; emphasis added.]

(b) *The LMRA Cases.* On the same day *Steele* was decided the Court concluded that the Wagner Act, the predecessor of the LMRA, imposed on labor unions "the responsibility of representing . . . fairly and impartially" the interests of "all the employees" in a bargaining unit. *Wallace Corp. v. Labor Board*, 323 U.S. 248, 255 (1944).[19] But the remedial question addressed in *Steele*

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[19] *Wallace Corp.* was, as noted in text, decided under the Wagner Act which, like the RLA, did not place any express duties on labor unions. Two years after *Wallace Corp.* Congress enacted the LMRA which amended the Wagner Act by, *inter alia*, placing a series of duties on unions. *See* LMRA § 8(b), 29 U.S.C. § 158(b).

Congress' action in proscribing unfair labor practices by unions—including a prohibition on discrimination against non-members, *see* LMRA § 8(b)(1)(A), (b)(2), 29 U.S.C. § 158(b)(1)(A), (b)(2)—

and *Howard* with respect to the RLA was not presented to this Court in a LMRA case until *Syres v. Oil Workers*, 350 U.S. 892 (1955).[20]

Syres came to this Court after an appellate-court had dismissed an LMRA fair-representation claim for lack of jurisdiction. Without argument and without issuing an opinion, the Court overturned the lower-court decision in a per curiam order based solely on the authority of *Steele*, *Tunstall* and *Howard*. That disposition followed logically from the RLA cases because like the RLA, the LMRA does *not* create either an express duty of fair representation or an express remedy for breaches of implied duties.

Several years after the decision in *Syres*, the National Labor Relations Board ("NLRB"), in *Miranda Fuel Co.*,

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arguably could have been read to state the limits of Congress' willingness, in 1947, to place duties on labor unions and thus to call into question the decision in *Wallace Corp.* to imply a fair-representation duty. Subsequently, of course, Congress has enacted express prohibitions on union discrimination on other grounds, such as race, gender, religion and national origin. *See* 42 U.S.C. § 2000e-2(c.) So far as we are aware, however, the Court was never asked to reconsider *Wallace Corp.* in light of the enactment of LMRA § 8(b), and thus the case became settled law.

[20] Two years before *Syres*, the Court decided *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), in which the plaintiff claimed that a collective bargaining agreement "violated his rights . . . under the Selective Training and Service Act of 1940" and that the union's "acceptance of those provisions exceeded its authority as a collective-bargaining representative under the National Labor Relations Act, as amended." *Id.* at 331-32. In the course of rejecting that claim the Court observed that "the authority of bargaining representatives is not absolute" and includes an obligation to "make an honest effort to serve the interest of all . . . members [of the bargaining unit] without hostility to any." *Id.* at 337. Because *Huffman* arose under the Selective Service Act, however, the Court had no occasion to consider whether an LMRA fair-representation claim, standing alone, is judicially cognizable.

140 NLRB 181 (1962), *enf. denied*, 326 F.2d 172 (2d Cir. 1963), found such an administrative remedy in the LMRA. The NLRB reached this surprising conclusion by asserting that "the 'right' guaranteed employees by Section 7 of the Act 'to bargain collectively through representatives of their own choosing,' . . . gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent." *Id.* at 185. From that premise the Board concluded that § 8(b)(1)(A)'s prohibition on conduct which "restrain[s] or coerce[s] employees in the exercise of the rights guaranteed in section 7" somehow "prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair." *Id.*

Given the large leaps in its reasoning, the *Miranda Fuel* rule has proved to be a controversial doctrine. The decision there was by a "sharply divided Board," *Vaca v. Sipes*, 386 U.S. 171, 176 (1967); and was denied enforcement by a unanimous Second Circuit panel, 326 F.2d 172. On three occasions this Court has declined invitations to endorse *Miranda Fuel*. *See Humphrey v. Moore*, 375 U.S. 335, 344 (1964); *Vaca v. Sipes*, *supra*, 386 U.S. at 186; *DelCostello v. Teamsters*, *supra*, 462 U.S. at 170.

Despite its shakiness as a precedent, the *Miranda Fuel* decision inevitably placed in question the holding of *Syres* recognizing a judicial remedy to enforce the duty of fair representation under the LMRA. For by the time *Miranda Fuel* was decided, this Court already had held, in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959), that "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the State as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." Thus, if *Miranda Fuel* correctly found NLRB jurisdiction over fair representation claims, it would seem to follow, under

Garmon, that the judicial cause of action could not survive.

In *Vaca v. Sipes*, *supra*, this Court was asked to so rule. *See* 386 U.S. at 176-77 ("With the NLRB's adoption of *Miranda Fuel*, petitioners argue, the broad preemption doctrine defined in *San Diego Building Trades Council v. Garmon*, becomes applicable").[21] The Court in *Vaca* understood that the issue before it was whether "Congress, when it enacted [LMRA] § 8(b) in 1947, intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative." 386 U.S. at 183. For a variety of reasons—which we discuss in detail below—the Court refused to "assume" such an intent "from the NLRB's tardy assumption of jurisdiction in these cases," and therefore refused to overturn *Syres*. 386 U.S. at 183.

(c) As the foregoing review of the RLA and LMRA cases makes clear, nothing in CSRA Title VII's "contemporary legal context," *Cannon v. University of Chicago*, *supra*, 441 U.S. at 699, would have led the 1978 Congress to believe that it was unnecessary to create an express judicial fair representation cause of action if such an action were intended. To the contrary, the lesson that *Steel* and *Howard* and *Syres* teaches is that such a remedy will be implied only "*[i]n the absence of any available administrative remedy*," and not where, as is true of CSRA Title VII, an express administrative remedy exists. P. 21 *supra*. And *Vaca* does not diminish the force of that lesson, for all that *Vaca* adds is that the creation of an administrative fair-representation

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[21] A similar argument was made to the Court three years before *Vaca* in *Humphrey v. Moore*, *supra*. The Court rejected that argument in two sentences, stating that since the claim before it "is one arising under § 301 of the Labor Management Relations Act," the complaint "was therefore within the cognizance of federal and state courts" even if the complaint alleged conduct which "is, or arguably may be, an unfair labor practice." 375 U.S. at 343.

remedy *after* a judicial remedy has been implied will not suffice to displace the preexisting judicial remedy.[22]

(4) Petitioner's argument rests on an entirely different reading of *Vaca*. According to petitioner, *Vaca* establishes that the existence of a system of exclusive representation "mandates a judicially enforceable duty of fair representation," Pet. Br. at 35, without regard to whether Congress, in creating the exclusive representation authority simultaneously creates an express fair-representation duty and an express administrative scheme to enforce that duty. Petitioner bases that argument on the following two sentences from *Vaca*:

> Were we to hold . . . that the courts are foreclosed by the NLRB's *Miranda Fuel* decision from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint. The existence of even a small number of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation. [*Id.* at 182-83; citations omitted.] [23]

[22] Thus *Vaca* is of a piece with *Merrill Lynch v. Curran, supra*, in which the Court proceeded from the premise that the issue was not whether Congress "intended to create a new remedy, since one already existed; the question is whether Congress intended to preserve the pre-existing remedy." 456 U.S. at 378-79. Here, of course, there was no preexisting remedy as Congress was enacting an entirely new statute.

[23] While our case does not rest on the point, we respectfully suggest that this portion of the *Vaca* decision contains the least satisfying branch of the Court's reasoning. For present purposes it suffices to note that the duty of fair representation undoubtedly plays an important role in the statutory scheme, but that the duty is surely no more central than, *e.g.*, the duty placed on employers to refrain from discriminating against employees (or job applicants) on the basis of union membership or nonmembership. Yet the latter duty is enforceable only through the administrative process, and the General Counsel has unreviewable discretion to refuse to issue a complaint against a discriminating employer notwithstanding "the wrong done the individual employee," *Vaca*, 386 U.S. at 182 n.8.

For at least three reasons, petitioner's reliance on this language is misplaced.

First, petitioner ignores the *context* of the sentences on which he relies. As we have seen the fundamental issue in *Vaca* was whether Congress in enacting the LMRA intended to displace a preexisting judicial cause of action. Thus, the very paragraph on which petitioner relies ends as follows:

> For these reasons, we cannot assume from the NLRB's tardy assumption of jurisdiction in these cases that Congress, when it enacted [LMRA] § 8 (b) in 1947, intended *to oust the courts of their traditional jurisdiction* to curb arbitrary conduct by the individual employee's statutory representative. [*Id.* at 183; emphasis added.]

Here, in contrast, the very different question posed is whether CSRA Title VII is properly interpreted as showing a congressional intention to create a *new* head of jurisdiction for the federal courts in an area where none had previously existed. Thus, the portion of the *Vaca* opinion on which petitioner relies is *not* addressed to the issue presented here at all; for that reason alone it would be wrong to read *Vaca* to warrant implying a judicial fair-representation cause of action from CSRA Title VII.

Second, the concern with protecting individual employees voiced by the *Vaca* Court was *not* stated as an *independent* ground for preserving the LMRA fair-representation cause of action but rather was put forth as one of three considerations which together supported that decision.

The *Vaca* Court observed that "[a] primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations

area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable" in the context of LMRA fair-representation suits. *Id.* at 180-81. The *Vaca* Court explained:

> [W]hen the Board declared in *Miranda Fuel* that a union's breach of its duty of fair representation would henceforth be treated as an unfair labor practice, the Board adopted and applied the doctrine as it had been developed by the federal courts. Finally, . . . fair representation duty suits often require review of the substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and in its handling of the grievance machinery; as these matters are not normally within the Board's unfair labor practice jurisdiction, it can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts . . . [*Id.* at 181; citations omitted.]

The *Vaca* Court also stressed that "[t]here are . . . some intensely practical considerations which foreclose preemption of judicial cognizance of fair representation duty suits, considerations which emerge from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts." *Id.* at 183. Noting that under LMRA § 301 proof of a breach of duty by the union suffices to allow an employee to bring a breach of contract action against his employer "in the face of a defense based on the failure to exhaust contractual remedies," the *Vaca* Court reasoned that

> it is obvious that the courts will be compelled to pass upon whether there has been a breach of the duty of fair representation in the context of many § 301 breach-of-contract actions . . . What possible sense could there be in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer? Under such a rule, either the employer would be compelled by the court to pay for the unions' wrong—slight deterrence, indeed, to future union misconduct—or the injured employee would be forced to go to two tribunals to repair a single injury. Moreover, the Board would be compelled in many cases either to remedy injuries arising out of a breach of contract, a task which Congress has not assigned to it, or to leave the individual employees without remedy for the union's wrong. [*Id.* at 187-88.]

Given the complex of considerations discussed in *Vaca*, that decision cannot fairly be read to hold that the LMRA provision granting unions exclusive representative status, in and of itself, establishes that Congress intended to preserve the preexisting fair representation remedy. *A fortiori*, *Vaca*, cannot be fairly read to hold that such a provision suffices to give rise to a judicial fair representation cause of action. Rather, the very most that can be extracted from *Vaca* is that such a provision is one factor that weighs against attributing to Congress an intent to repeal a fair representation cause of action once such an action has been recognized.

Vaca's reasoning thus falls far short of providing a basis for imputing to Congress an intent to *create* an implied judicial cause of action here. Indeed, given the structure of CSRA Title VII, *Vaca*'s reasoning would *not* support the inference that a pre-existing implied cause of action (if there had been one) was intended to survive that Title's enactment. For two of the three factors on which the Court in *Vaca* relied in concluding that Congress did not intend to repeal the existing LMRA remedy are absent here.

Unlike the NLRB, whose jurisdiction under the LMRA is limited to resolving representation disputes and adjudicating unfair labor practice claims, the FLRA is empowered by the CSRA to hear virtually all challenges to arbitral awards interpreting federal sector collective bargaining agreements, and its power in this regard is exclusive. Pp. 23-24, *supra*. In addition, CSRA Title VII

§ 7117(b), (c) confers on the FLRA a special authority to decide "negotiability disputes," *viz.*, disputes as to whether a particular matter is subject to bargaining or falls within the management rights provision of the Act; the existence of this power causes the FLRA to become extensively involved in reviewing the collective bargaining process under CSRA Title VII. Thus, in sharp contrast to the situation under the LMRA, the FLRA *does* "bring[] substantially greater expertise to bear on these problems than do the courts." *Vaca*, 386 U.S. at 181.

Similarly, because CSRA Title VII contains no analogue to LMRA § 301—because, in other words, that Title does *not* create a judicial remedy against federal employers to enforce collective bargaining agreements—the "practical considerations" on which the *Vaca* Court relied preclude implying such a remedy for CSRA fair representation claims. Under such an implied action, the judiciary would be required "to remedy injuries arising out of a breach of contract, a task which Congress has not assigned to it." *Vaca*, 386 U.S. at 188. And because the courts in all events cannot provide relief against federal employers, implying a cause of action against federal sector unions would leave an employee victimized by a breach of contract which the union wrongfully failed to grieve with only a partial remedy, thereby forcing the individual "to go to two tribunals to repair a single injury." *Id.*

Thus, read as a whole, the complex of considerations discussed in *Vaca* militate against implying from the CSRA a civil remedy to enforce the duty of fair representation.

Third and finally, insofar as *Vaca* emphasizes the interest of the individual employee in obtaining "impartial review of his [fair-representation] complaint," the decision reflects the Court's sensitivity to the fact that the LMRA's grant of exclusive-representative status to unions "extinguishes the individual employee's power to

order his own relations with his employer," *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967), and to that extent, in *Vaca*'s words, works a "corresponding reduction in the individual rights of the employees" and "strip[s those employees] of traditional forms of redress." 386 U.S. at 182.[24] The CSRA does not have a like effect, however, because, as the Solicitor General explained in his brief *amicus curiae* in this case:

> In the federal sector . . . employment is a result of appointment, *not of contract* (*see Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 745-41 (1982)), and the statutory grant of exclusive bargaining power does not strip a federal employee of substantial pre-existing rights. The employee has no right to make or enforce an individual contract of employment with his agency-employer, and the exercise of exclusive bargaining powers by the union does not deprive the appointed individual of any statutory or constitutional protections. In particular, the CSRA did not deprive petitioner of any rights he would otherwise have had or have been contractually able to obtain against his employer with respect to the promotion at issue. See *United States v. Testan*, 424 U.S. 392 (1976); *Arnett v. Kennedy*, 416 U.S. 134 (1974). [Br. for U.S. at 16; emphasis added.]

The only right that an individual federal employee had, prior to the enactment of the CSRA, to shape the terms

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[24] The Court had made this same point in *Steele*, as well, in first recognizing the duty of fair representation. *See* 323 U.S. at 202 ("Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents"). *See also, e.g., DelCostello v. Teamsters*, 462 U.S. 151, 164 n.8 (1983) ("the duty of fair representation exists because it is the policy of the [LMRA] to allow a single labor organization to represent collectively the interests of all employees within a unit, thereby depriving individuals in the unit of the ability to bargain individually or to select a minority union as their representative").

and conditions of his or her employment was the right, at least in certain circumstances, to enforce the statutes and regulations which define the terms of civil service employment. In enacting the CSRA, Congress preserved and expanded upon that right by providing for appeals of adverse actions and of performance actions to the Merit Systems Protection Board, *see* 5 U.S.C. §§ 4302, 7512, and by providing recourse with respect to "prohibited personnel practices" through the Special Counsel, *see* 5 U.S.C. § 2302(b); these remedies are in addition to remedies available to federal employees through the Comptroller General, *see* 4 C.F.R. part 31, and through the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16.

More importantly for present purposes, in enacting CSRA Title VII, Congress went to great pains to assure that the creation of a collective bargaining system with exclusive representation would *not* extinguish an individual employee's freedom to invoke any of these remedies. Thus, § 7114(a)(5), 5 U.S.C. § 7114(a)(5), provides that:

> The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from—
>
> (A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or
>
> (B) exercising grievance or appellate rights established by law, rule, or regulation;
>
> except in the case of grievance or appeal procedures negotiated under this chapter.

And CSRA Title VII § 7121, 5 U.S.C. § 7121, which governs contractual grievance procedures under the Act, requires that all such procedures preserve for individual

employees the right, in lieu of prosecuting a contractual grievance, to file a prohibited personnel practice charge or an adverse action appeal before the Merit Systems Protection Board.

(5) The short of the matter, then, is this. The CSRA is a unique law which creates its own form of exclusive representation and contains its own remedial scheme. In enacting that law, Congress had no reason to assume from the RLA or LMRA cases that the courts would imply a judicial remedy to enforce the duty of fair representation in addition to the administrative remedy Congress expressly created, especially when Congress so carefully excluded the judiciary from any role in adjudicating claims under or involving, federal sector collective bargaining agreements. To the contrary, the decided case law as of 1978—both the case law under the RLA and LMRA and also the implied-cause-of-action decisions—pointed to the opposite conclusion.

Given the state of the law it was incumbent upon the 1978 Congress to create an express judicial cause of action if such was its intent. Congress did not do so, and left no reason to believe that this omission was the result of an absent-minded oversight. Thus, regardless of whether the addition of such a remedy would detract from or "improve upon the statutory scheme that Congress enacted into law," it is "'not for us to fill any *hiatus* Congress has left in this area.' . . . [I]f Congress intends . . . such a federal right of cation, it is well aware of how it may effectuate that intent." *Touche, Ross & Co. v. Redington, Trustee, supra*, 442 U.S. at 578-79.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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(9)

No. 87-636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EFTHIMIOS A. KARAHALIOS,

Petitioner,

v.

DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, PRESIDIO OF MONTEREY, and LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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In our opening brief, we showed that federal district court jurisdiction over duty of fair representation cases is an essential element in a collective bargaining system which grants exclusive representation powers to unions, regardless of whether the unions operate in the federal sector, private sector, railway sector, or postal sector.[1] Respondent and *amici* have failed to present any cogent reason to believe that Congress intended to bar access to

[1] Commentators agree. T. Brower, *The Duty of Fair Representation Under the Civil Service Reform Act: Judicial Power to Protect Employee Rights*, 40 Okla. L. Rev. 361, 364 (1987); Note, *Federal Employees, Federal Unions, and Federal Courts: The Duty of Fair Representation in the Federal Sector*, 64 Chi.-Kent L. Rev. 271, 273 (1988).

the federal courts to federal sector employees injured by their unions, or that Congress intended federal sector duty of fair representation actions to reach diametrically opposed results from the private sector precedents established long ago by this Court in *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944), and *Vaca v. Sipes*, 386 U.S. 171 (1967).

1. Congressional Intent

The question before the Court is whether Congress, when it established federal sector collective bargaining under the CSRA, intended to depart from *Steele* and *Vaca* and instead intended to preclude a judicial forum for federal sector duty of fair representation cases.[2]

In contrast to the authorities relied upon by respondent and *amici*,[3] the Court's present task is simplified because, in

[2] As the Court has repeatedly recognized, divination of congressional intent in an implied cause of action case can be a formidable task, particularly where there is a paucity of legislative history on the subject. While undoubtedly the better course for Congress to follow when a private cause of action is intended would be for it expressly to include that remedy in the statute, "the Court has long recognized that under certain limited circumstances the failure of Congress to do so is not inconsistent with an intent on its part to have such a remedy available to the persons benefited by its legislation." *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 374 (1981), *citing Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979).

[3] In *Thompson v. Thompson*, 484 U.S. _____, 108 S.Ct. 513 (1988) and *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), the cases relied upon by respondent and *amici* to support their contention that Congress intended to alter the established private sector duty of fair representation, the Court was faced with substantial difficulty in ascertaining congressional intent to allow a private cause of action. For example, in *Touche Ross*, 442 U.S. at 562 n.2, the Court confronted legislation where no prior private cause of action existed when the statute was passed. In *Thompson*, 108 S. Ct. at 518, the Court dealt with an issue (Full Faith and Credit Clause cases) where the Court had traditionally refused to imply a private cause of action (unlike duty of fair representation cases). In

(continued)

passing Title VII of the CSRA, Congress was hardly writing on a blank slate.[4] Instead, Congress was legislating in an arena where the federal courts have traditionally fashioned judicial remedies for duty of fair representation actions. When Congress constructed a federal sector duty of fair representation modeled on the private sector paradigm, it drew upon over forty years of experience with this Court's development of implied judicial remedies in *Steele*, *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944), and *Vaca*.

The legislative history demonstrates that Congress structured the federal sector duty of fair representation directly on the preexisting NLRA private sector model. Pet.Br. 18-22. "Congress adopted for government employee unions the private sector duty of fair representation." *National Treasury Employees Union v. FLRA*, 800 F.2d 1165, 1171 (D.C. Cir. 1986).[5]

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 20-21 (1979), the Court found the requisite intent to be lacking when Congress created a series of express judicial remedies in companion legislation, but declined to do so in the statute under scrutiny. Similarly, in *California v. Sierra Club*, 451 U.S. 287 (1981), *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 772 (1981), *Touche Ross, Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 92 (1981), and *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981), the Court declined to imply the necessary legislative intent, where the statute clearly was not enacted for the special benefit of the class to which plaintiff belonged.

[4] Respondent contends that Congress should have been more active in legislating express remedies as a result of the observations in then-Justice Rehnquist's concurring opinion in *Cannon*, 441 U.S. at 717. Resp.Br. 14. To the extent that this argument is persuasive, it loses much of its force due to the timing of the *Cannon* opinion, which appeared in 1979, *after* the Civil Service Reform Act of 1978 had been passed.

[5] Both respondent and the Solicitor General appear to agree that Congress intended to create in the CSRA the same duty of fair representation which existed in the private sector. Resp.Br. 4-5; Br. of the United States 9 n.4.

Where Congress consciously adopted the private sector model for this part of the federal sector collective bargaining system, and where for the past forty years this Court has repeatedly implied a private cause of action for breach of the duty of fair representation as a necessary corollary to the congressional grant of exclusive representation to the unions, Congress must be held to have incorporated the rule of *Steele* and *Vaca* into the CSRA. Substantial authority exists for this position in non-labor contexts also.

This Court has recognized implied private causes of action when Congress has acted in an area where a judicially implied cause of action exists in "related legislation prior to the subject statute's enactment, or of the same legislation prior to its reenactment...." *Thompson*, 108 S. Ct. at 520-23 (Scalia, J., concurring); *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-85 (1983); *Merrill Lynch v. Curran*, 456 U.S. at 378-79; *Cannon*, 441 U.S. at 688-89; *Lorillard v. Pons*, 434 U.S. 575, 581 (1978).

Thus, the Court in *Herman & MacLean* unanimously upheld the continued existence of a well-recognized implied judicial remedy for violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), notwithstanding that Congress in 1975 "enacted 'the most substantial and significant revision of this country's Federal securities laws since the passage of the Securities Exchange Act in 1934'" (but was silent with regard to the propriety of the judicially implied cause of action under § 10(b)). 459 U.S. at 384-85. As the Court noted, "[i]n light of the well-established judicial interpretation, Congress' decision to leave § 10(b) intact suggests that Congress ratified the cumulative nature of the § 10(b) action." *Id.* at 386.

In the same vein, the Court in *Cannon* discerned congressional intent to provide a private cause of action where

such a remedy had been well-recognized under a related statute. *Cannon* involved a sex discrimination claim under Title IX of the Education Amendments of 1972, which contained administrative enforcement mechanisms but no express private judicial remedies. The Court found Title IX patterned after Title VI of the Civil Rights Act of 1964, which included similar administrative mechanisms without providing any express private judicial remedy. 441 U.S. at 694. Reasoning that the enforcement schemes were intended to be the same under Title IX, the Court felt that Congress must have been aware of the judicially implied remedies found in Title VI, and thus intended no changes in the enforcement mechanisms when it enacted Title IX. 441 U.S. at 696-98. *See also Merrill Lynch*, 456 U.S. at 381-86.

The Court has often recognized that "where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law." *Lorillard*, 434 U.S. at 581. On numerous other occasions, the Court has found similar congressional agreement with, and acquiescence in, judicially implied rights through congressional silence when Congress adopted, without altering, the statutes under which the rights had been implied.[6]

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[6] *See Norwest Bank Worthington v. Ahlers*, ____ U.S. ____, 108 S. Ct. 963 (1988) (Congress acted with awareness of judicial interpretation given to prior bankruptcy law); *Immigration and Naturalization Service v. Phinpathya*, 464 U.S. 183, 200 (1984) (Brennan, J., concurring) (Court can look to judicial interpretations under prior immigration law to determine congressional intent); *Hillsboro National Bank v. Commissioner of Internal Revenue*, 460 U.S. 370, 402 (1983) (Congress' failure to mention a long-standing judicial interpretation of the Internal Revenue Code when it overhauled the code in the Economic Recovery Tax Act of 1981 indicates Congress' acquiescence in the former judicial interpretation).

Herman & MacLean and *Cannon* are directly analogous to the instant case. In the duty of fair representation area, as in those cases, the courts have consistently found an implied private cause of action. There is no indication in the legislative history involved in this case, or in *Herman & MacLean* and *Cannon*, that Congress intended to reach different results where the implied private cause of action is concerned, despite the presence of administrative remedies. Here, as in *Cannon*, Congress imported the preexisting statutes' rights and administrative mechanisms without any suggestion of an intent to omit the implied companion judicial remedies. As in *Herman & MacLean*, Congress' decision to leave the duty of fair representation intact supports congressional ratification of the holding in *Vaca* for federal sector employees.

Respondent's counter-arguments are inapposite. *United States v. Fausto*, 484 U.S. _____, 108 S. Ct. 668 (1988), arose in a context very different from that of the instant case. Although it involved interpretation of the CSRA, *Fausto* did not address the duty of fair representation and collective bargaining system modeled on the NLRA.

Instead, *Fausto* was concerned with whether a "non-preference eligible" in the excepted service could judicially challenge an adverse personnel action, where the applicable CSRA provisions specifically provided such remedies to "preference eligibles" only. *Id.* at 671. The Court noted that Congress had explicitly enacted certain protections as to specified nonpreference excepted employees, but not as to others, and that the distinctions made by the CSRA between preference, nonpreference and competitive service employees merely continued the traditional civil service system. *Id.* at 672-73. Under these circumstances, the Court readily inferred congressional intent to differentiate between the remedies available to excepted service non-

preference eligible employees and competitive service employees. *Id.* at 673-74. These facts bear little resemblance to the case at bar, where no discernible congressional intent to exclude petitioner from a judicial remedy exists.

Moreover, *Fausto* involved one of the myriad and haphazard avenues available for challenges to adverse personnel actions which the CSRA was expressly designed to replace. *Id.* at 671-72. In Title VII of the CSRA, Congress superseded those haphazard appeal rights with the collective bargaining and exclusive grievance procedures so familiar in the NLRA. S. Rep. No. 969, 95th Cong., 2d Sess. 3, 10 (1978); Pet.Br. 41-42. In contrast, the duty of fair representation is an area where Congress intended to import, not displace, private sector law. *E.g.*, H.R. Rep. No. 1403, 95th Cong., 2d Sess. 41; S. Rep. No. 969, 106; *National Treasury Employees Union v. FLRA*, 800 F.2d at 1169.

The Solicitor General and *amicus* NTEU suggest that the duty of fair representation confers no benefit on the class to which petitioner belongs, thereby precluding a judicial remedy. Br. of the United States 14-15; NTEU Br. 10. This position is untenable. This Court has already recognized that the duty of fair representation is one of the classic examples where the plaintiff is "one of the class for whose *especial* benefit the statute was enacted." *Cannon*, 441 U.S. at 688, 690 n.13 (referring specifically to *Steele* and *Tunstall)*; *accord*, Note, 64 Chi.-Kent L. Rev. at 312-14.

2. History and Structure of the CSRA

When the private sector duty of fair representation was adopted in the federal sector, nothing in the language, structure, or legislative history of the federal sector duty of fair representation manifested congressional

intent to reject the holdings of this Court in *Steele*, *Tunstall*, and *Vaca*. Indeed, Congress was well aware of the Court's landmark decisions in these cases, and ratified the Court's recognition that a judicial forum was essential for employees injured by their exclusive bargaining representative.

a. Reading only respondent's brief, one would assume that the collective bargaining enforcement provisions in the CSRA and the NLRA are radically different. Resp. Br. 22. Respondent fosters this misunderstanding by avoiding a discussion of the key similarities pointed out in petitioner's opening brief, which indicate that the duty of fair representation is to be handled identically under both statutes. Pet.Br. 19-21. *Nowhere* does the statutory scheme suggest that the federal sector duty of fair representation, codified at 5 U.S.C. § 7114(a)(1), departs from private sector principles, or countenances any lesser or different duty than that imposed in the private sector.[7]

Respondent ignores the fact that, like their private sector counterparts, federal employee unions are the exclusive representatives of all workers in the bargaining unit. 5 U.S.C. §§ 7111, 7114. They alone have the right to bargain collectively with an employer (5 U.S.C. § 7114(a)(4)); they alone develop and control grievance procedures (5 U.S.C. § 7121(a)(1)); and they alone have access to binding arbitration (5 U.S.C. § 7121(a)(1)). Indeed, given the virtually identical grant of exclusive representational sta-

[7] The observation of respondent and *amici* that the language of § 7114(a)(1) was drawn from the superseded Executive Order (Resp.Br. 9 n.1; Br. of the United States 21-22) is not persuasive. Under the Executive Order, the duty to represent fairly all employees in a bargaining unit referred to the parallel obligation in the private sector (*e.g.*, *Tidewater Virginia Federal Employees Metal Trades Council/Int'l Ass'n of Machinists, Local No. 441*, 8 F.L.R.A. 217 (1982); *see also NTEU, Chapter 202*, 1 F.L.R.A. 909 (1979)), an obligation which in the private sector has been judicially cognizable since 1944.

tus to unions under the CSRA, 5 U.S.C. § 7111, the NLRA, 29 U.S.C. § 159(a), and the RLA, 45 U.S.C. § 152, Fourth, it would be difficult to imagine that the duties imposed upon federal sector unions to represent fairly the members of the bargaining unit could be any less significant than in the private sector. *See, e.g., Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976).

While respondent and the Solicitor General go to great lengths to point out the administrative enforcement mechanisms available for unfair labor practice charges before the FLRA (Resp.Br. 8-9; Br. of the United States 15-16), neither recognizes that *identical* administrative unfair labor practice remedies exist under the NLRA, and were found by this Court to be categorically inadequate in duty of fair representation cases. *Vaca*, 386 U.S. at 182-83; Pet.Br. 18-22. Similarly, Congress provided comparable appellate judicial review of both FLRA and NLRB unfair labor practice decisions.[8]

That Congress provided the same duty of fair representation in both statutes, practically identical language in

[8] As respondent correctly points out, circuit court review of arbitral decisions is *generally* precluded under 5 U.S.C. § 7123(a)(1) (Resp.Br. 16-17), which undoubtedly reflects the ability of the FLRA to review arbitral decisions, while such review in the NLRA is left to the district courts. *Compare* 5 U.S.C. §7122 *with* 29 U.S.C. § 185.

However, respondent is simply wrong in asserting that "*any judicial review whatsoever*" of FLRA decisions involving arbitral awards is precluded. Resp.Br. 17. Respondent fails to mention that, in the same section, Congress created an express exception to this rule where unfair labor practices are concerned. 5 U.S.C. § 7123(a)(1). Appellate court review of FLRA orders regarding any arbitral award which "involves an unfair labor practice under section 7118 of this title..." in the federal sector thus parallels long-standing appellate court review of such matters in the NLRA context. *Compare* 5 U.S.C. § 7123(a)(1) *with* 29 U.S.C. § 160(f). There is no indication that where unfair labor practices are concerned, Congress retrenched in any respect from the private sector appellate court review mechanisms.

both statutes for enforcing unfair labor practices, and substantially parallel provisions for appellate court judicial review provides convincing—if not conclusive—evidence that Congress intended to treat the duty of fair representation in the federal sector exactly as it had been treated in the private sector for decades theretofore.

Respondent asserts that because arbitrability and challenges to arbitral awards involve particular issues of collective bargaining agreement interpretation, and because some limited types of duty of fair representation actions involve other, distinct questions of labor contract construction, federal court jurisdiction over all duty of fair representation actions "would be directly contrary to the judgments Congress made in framing CSRA Title VII." Resp.Br. 20. This reasoning is flawed.

First, not all duty of fair representation cases involve breach of contract claims. Some suits entail an examination of union negotiating positions (*e.g.*, *Steele*) or other non-contract breach matters. *E.g.*, *CWA v. Beck*, ____ U.S. ____, 108 S. Ct. 2641 (1988). Even those duty of fair representation actions alleging union failures in grievance handling need not necessarily implicate labor contract violations. *E.g.*, *Hayes v. Consolidated Service Corp.*, 517 F.2d 564 (1st Cir. 1975); *Mumford v. Glover*, 503 F.2d 878 (5th Cir. 1974).

Second, substantive arbitrability and compulsion of recalcitrant employers or unions to abide by a contractual promise to arbitrate raise issues very different from those involved in duty of fair representation actions. The former topics are intertwined with the permissible scope of bargaining agreements and bargaining subjects. Accordingly, they implicate the negotiability determinations unique to the federal employee labor-management system (5 U.S.C.

§§ 7105(a)(2) and 7117), matters not normally presented by duty of fair representation suits. Congressional deferral of actions to compel arbitration and substantive arbitrability to the administrative agency presumably familiar with the scope of bargaining in the federal sector is unsurprising. *See* 5 U.S.C. §§ 7105(2)(D) and (E) and 7117; *NFFE v. Commandant, Defense Language Institute*, 493 F. Supp. 675, 679 (N.D. Cal. 1980).

Conversely, where unfair labor practices are concerned, Congress has evidenced no aversion to judicial review, even though an arbitral award is involved.[9] In the CSRA, Congress consciously rejected a continuation of the Executive Order system which had provided no role for the federal courts in the enforcement of federal employee labor relations. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 92-93 (1983). Accordingly, Congress directly imported the NLRA concept of appellate review of unfair labor practices into the CSRA. *Compare* 5 U.S.C. § 7123(a)(1) *with* 29 U.S.C. § 160(f).

Third, respondent cites *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960), and *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960), to exemplify the type of

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[9] Indeed, "as remedial legislation, title VII [of the CSRA] is to be construed broadly to achieve its remedial purposes .... In the past, parties benefiting from remedial legislation have been able to enforce the remedial purposes even against the agency administering the legislation. We fully expect this to be the case with title VII as well. For this reason, we declined to bar judicial review of the remedial actions of the Authority." 124 Cong. Rec. H13,610 (daily ed. Oct. 14, 1978) (remarks of Rep. Ford introducing the Joint House-Senate Conference Bill). *See also* 124 Cong. Rec. H8468 (daily ed. Aug. 11, 1978) (remarks of Rep. Ford) ("Judicial review is one of the primary benefits of a statutory program over an Executive Order, and to limit such review also limits the advantages of codification.")

issues Congress directed to the FLRA (Resp.Br. 15), thus asserting that Congress thereby intended to preclude the courts from serving as a forum for duty of fair representation cases. Resp.Br. 15-17. Despite the union's citation, the central focus of the *Steelworkers Trilogy* lay in the prevention of encroachment on the private dispute resolution mechanisms negotiated by unions and employers. *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649-50 (1986). Even the strong preference for arbitration articulated in the *Steelworkers Trilogy* must give way to the unique concerns of duty of fair representation actions. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 736 n.10 (1981), *citing Hines v. Anchor Motor Freight, Inc.*, 424 U.S. at 567. As such, the congressional decision to protect the employer-union arbitration system by an administrative agency (as in the CSRA) rather than by the courts (as in the NLRA) is inapposite. The fundamental premise of the duty of fair representation is that the individual employee's interests are not adequately protected by either labor-management institutions (the collective bargaining system and grievance procedures) or by the institutional players (the union, the employer, and the administrative agency) when the individual employee's interests diverge from the principal actors' goals.[10] *Vaca*, at 182-83; *Steele*, at 202-03.

b. Next, the structure and placement of the duty of fair representation provision, 5 U.S.C. § 7114(a)(1), suggest

[10] The Solicitor General's argument that the Merit Systems Protection Board provides an additional administrative remedy for employees in petitioner's position is wrong. Br. of the United States 27. Where the exclusive bargaining representative has bargained for, and achieved, a negotiated grievance procedure which is the exclusive avenue for redress of the employee grievances at issue, appeal to the MSPB under 5 U.S.C. § 7701 is not available. 5 C.F.R. § 1201.3(b) (1982); *Moreno v. Merit Systems Protection Bd.*, 728 F.2d 499, 500-01 (Fed. Cir. 1984).

that Congress did not intend to make the sole remedy for breach of the duty of fair representation an administrative unfair labor practice proceeding. Congress enumerated a long list of unfair labor practices in § 7116, but did not include the duty of fair representation. Instead, Congress placed the duty of fair representation in the section dealing with representation rights. *See* 5 U.S.C. § 7114. The duty of fair representation under § 7114(a)(1) is an unfair labor practice only to the extent that it happens to fall within the general "catch-all" unfair labor practice provisions of § 7116(b)(8).[11] The segregation of the duty of fair representation from traditional unfair labor practices in the CSRA may well indicate congressional recognition of "the unique interests served by the duty of fair representation doctrine" which this Court in *Vaca* found mandated court jurisdiction over such claims despite administrative agency unfair labor practice remedies. 386 U.S. at 181-82.

c. In passing the CSRA, Congress was not announcing a radical departure from the principles enunciated in *Vaca* and *Steele*. The legislative history supports this view.

[11] Significantly, while the legislative history treats at some length the issue of what will be considered an unfair labor practice, *e.g.*, S. Rep. No. 969, 105-06, there is no indication in the legislative history that a breach of the duty of fair representation would be treated as an unfair labor practice. Indeed, the House's only explanation for the catch-all provision of § 7116(b)(8) is that it was intended to include failure of a union to comply with a final order of the FLRA in an unfair labor practice proceeding. H.R. Rep. No. 1403, 50. There is no legislative mention of using this catch-all provision to enforce duty of fair representation breaches as unfair labor practices. Moreover, the only reference to the duty of fair representation in the congressional debates on the CSRA appears in the context of countering exclusive union power. 124 Cong. Rec. H13,609 (daily ed. Oct. 14, 1978) (remarks of Rep. Ford). Accordingly, there is little legislative history support for the opposition's claim that Congress intended unfair labor practice actions to be the *sole* remedy in duty of fair representation cases.

As the Solicitor General accurately notes, "[n]o statement made in the legislative history of the CSRA speaks directly to the question presented here." Br. of the United States 17. However, the Solicitor General opines that judicial cognizance of duty of fair representation actions would upset the "carefully crafted" scheme of unfair labor practice enforcement in the CSRA. *Id.* He bases this contention first on the fact that the FLRA General Counsel has the final decision on whether to issue an unfair labor practice complaint. *Id.* at 18. This is simply the private sector model, as Congress recognized during the CSRA debates. Pet.Br. 20.

The Solicitor General then asserts that, since unfair labor practice complaints are intended to be "channeled" through the FLRA, Congress intended to foreclose federal employees injured by their unions from a judicial forum.[12] Br. of the United States 18; *see* Resp.Br. 7, 23. In support of his position, the Solicitor General quotes two congressional reports to the effect that privately unresolved unfair labor practices will be filed with the FLRA (S. Rep. No. 969, 107) and that the FLRA General Counsel will decide when to issue an unfair labor practice complaint. H.R. Rep. No. 1403, 52; Br. of the United States 18. The Solicitor General asserts that "[t]his legislative history is difficult to reconcile with recognition of a private cause of action for enforcement of the duty of fair representation." Br. of the United States 19.

[12] These "channeling" suggestions are not unique to the CSRA, but have their direct equivalents in the Court's NLRA preemption jurisprudence under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Even in the face of the strong *Garmon* preemption doctrines, the same channeling arguments were considered in *Vaca* and rejected, as the Court found that duty of fair representation issues were a necessary exception to the application of the *Garmon* rules. 386 U.S. at 178-84; *see also* Brief for United States as *Amicus Curiae* in *Vaca* 13-14; Brief for AFL-CIO as *Amicus Curiae* in *Vaca* 22.

The Solicitor General's cursory examination of the legislative history utterly ignores the context of the congressional snippets presented. All that these citations demonstrate, when considered in context with the rest of the Senate report (S. Rep. No. 969, 106), is that Congress intended the FLRA to have the same authority in the area of federal sector unfair labor practice complaints that the NLRB has in the private sector. This conclusion supports petitioner's argument that Congress utilized the private sector model in designing the federal sector duty of fair representation, a concept which necessarily includes a judicial forum for duty of fair representation claims under *Steele* and *Vaca*.[13] Pet.Br. 19-20.

Respondent argues that the legislative history evidences a congressional compromise, with "the House [accepting] the Senate's decision to keep the courts essentially out of the business of considering disputes under collective bargaining agreements by foreclosing access to the courts either to compel arbitration or to obtain review of FLRA decisions on exceptions to arbitral awards." Resp.Br. 19. Respondent's position is based upon a largely mistaken view of the Senate's "decision" here.

The joint conference hearings cited by respondent (Resp.Br. 19 nn.14-15) indicate that the conferees were

[13] Petitioner has never suggested that Congress "simply borrowed" the text of the CSRA from some other statute, nor has petitioner advocated the wholesale importation of private sector labor law into the CSRA. Resp.Br. 21, 23. Rather, petitioner has utilized an approach similar to that employed by the Circuit Court for the District of Columbia, *e.g.*, *National Treasury Employees Union v. FLRA*, *supra*; *National Treasury Employees Union v. FLRA*, 810 F.2d 295 (D.C. Cir. 1987); *National Treasury Employees Union v. FLRA*, 826 F.2d 114 (D.C. Cir. 1987), which recognizes the private sector parallels in the CSRA where appropriate and deviates from them where the CSRA contains provisions unique to the federal sector. Pet.Br. 34-36.

only concerned with the narrow grant of FLRA authority to decide arbitrability issues. House-Senate Conference on S. 2640 (Sept. 27, 1978), at 51-52. There was no indication that the conferees wished to give federal employees fewer protections than private sector employees. *Id.* (Sept. 21, 1978), at 32-33 (remarks of Rep. Spellman). Moreover, where unfair labor practice decisions were concerned, the Senate clearly wanted judicial review of FLRA awards.[14] Contrary to respondent's assertion (Resp.Br. 19 n.13), Congress essentially adopted the Senate's position by codifying appellate review of FLRA orders involving unfair labor practice charges, even where an arbitral award has been made. 5 U.S.C. § 7123(a)(1).

In short, the CSRA unfair labor practice enforcement machinery is no different from the private sector system—the very structure which this Court determined inadequate to protect an individual employee's fair representation rights in the absence of access to a judicial forum. *Vaca*, 386 U.S. at 182-83.

3. Policy Considerations

The logic and rationale of *Steele*, *Vaca*, *Hines*, and *Bowen v. United States Postal Service*, 459 U.S. 212

[14] The Stevens amendment proposed the same appellate review for federal sector unfair labor practice decisions accorded NLRB unfair labor practice decisions. Senator Stevens' comments in this regard are unequivocal:

> An unfair labor practice is basically the same, whether it is brought before the Federal Labor Relations Authority or the National Labor Relations Board. The only difference is in one case the employer is the Government, in the other it is private industry.
>
> Mr. President, my amendment will provide for judicial review of Federal Labor Relations Authority decisions as they concern unfair labor practices. The review will be similar to that of the Merit System Protection Board's and the National Labor Relation Board's.

124 Cong. Rec. S14,322 (daily ed. Aug. 24, 1978) (remarks of Sen. Stevens).

(1983), compel federal court jurisdiction for federal sector duty of fair representation cases. As the duty of fair representation has evolved, this Court has repeatedly recognized that concomitant with the congressional grant of the extraordinary power of exclusive representation is the duty of fair representation. *DelCostello v. Teamsters*, 462 U.S. 151, 164 n.14 (1983); *Hines*, 424 U.S. at 564, *citing Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Vaca*, 386 U.S. at 182, *citing Steele*, 323 U.S. at 198-99. Given the potential abuse which a tyrannical exclusive representative could wreak on the careers of dissident minority employees, those employees must be provided an *unconditional* opportunity to protect themselves in a judicial forum, not merely one dependent upon the "unreviewable discretion" of the General Counsel. *Vaca*, 386 U.S. at 182-83; *see NLRB v. United Food and Commercial Workers Union*, 484 U.S. ——, 108 S. Ct. 413 (1987).

Respondent attempts to obscure the fundamental reason for the four-decade existence of a judicial forum for duty of fair representation cases by asserting that this Court's concern for protecting individual employees (the *raison d'etre* of *Vaca* and *Steele*) is practically irrelevant because it "was *not* stated [in *Vaca*] as an *independent* ground for preserving the ... fair representation cause of action...." Resp.Br. 31 (emphasis in original). Respondent's argument completely ignores the Court's decisions in the decades since *Vaca*, which expressly recognize that judicial oversight of duty of fair representation cases is a necessary implication of the grant of exclusive representation status. *E.g.*, *DelCostello*, 462 U.S. at 164 n.14.

Respondent and the Solicitor General contend that the FLRA has primacy over the creation of duty of fair representation law, and advance the notion that it is necessary to avoid conflicting decisions between the courts and the administrative agency. Br. of the United

States 19-20; Resp.Br. 33-34. However, the Court in *Vaca* rejected the very contention that these factors counseled in favor of closing the federal courts to injured employees. 386 U.S. at 181; *see* Brief of the AFL-CIO in *Vaca* at 22; Brief of the United States in *Vaca* at 16.

Moreover, the FLRA and its predecessor agency, the FLRC, have routinely looked to the expertise of the federal courts and judicial decisions under the National Labor Relations and Railway Labor Acts to resolve the duty of fair representation claims of federal employees. *NFFE, Local 1453 (Crawford)*, 23 F.L.R.A. 686 (1986); *AFGE, Local 987 (Nedra Bradley)*, 3 F.L.R.A. 714 (1980).

There is certainly no reason to believe that the FLRA, as an administrative agency, is any better equipped than the NLRB to focus on the relief to the individual employee in a duty of fair representation case.[15] "The

[15] In his discussion of the FLRA's settlement, the Solicitor General's recitation of the underlying facts is entirely incorrect. Br. of the United States 28 n.13. The General Counsel's reference to the "charged party" in his Nov. 24, 1980 letter was a reference to the *employer-agency* (not the *union* as the Solicitor General asserts at page 28 n.13 of his Brief). The letter was only directed to the unfair labor practice charge against the employer-agency, and had nothing to do with the unfair labor practice charge against the union. *Compare* First Amended Complaint, Ex. 15 *and* Ex. 16 *with* First Amended Complaint, Ex. 19.

The Solicitor General's suggestion that the FLRA's settlement of the unfair labor practice charge against the respondent was "reasonable" is not persuasive (Br. of the United States 28 n.13), as the district court's findings in this regard are the subject of petitioner's cross-appeal, which has not been decided. In this regard, petitioner believes that the respondent's continuous breaches of the duty of fair representation destroyed the integrity of the testing process, such that the tests of the employees could not be meaningfully compared (a conclusion apparently shared by the district court, JA at 95 n.11). Petitioner believes that under these circumstances, where the respondent's actions caused or contributed to the difficulty in making the necessary comparisons, any uncertainty should be resolved against the respondent. *E.g., Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 345 (5th Cir. 1980).

fundamental purpose of unfair representation suits is to compensate for injuries caused by violations of employees' rights.... [R]elief in each case should be fashioned to make the employee whole." *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 49 (1979), *citing Steele*, 323 U.S. at 206-07. The right of the employee injured by his union's actions to be made whole is "[o]f paramount importance." *Bowen*, 459 U.S. at 222. Without a judicial forum this right is jeopardized, as the FLRA General Counsel has the same unreviewable discretion to bring, dismiss, or settle a case (even over the objection of the employee) which the NLRB General Counsel enjoys, and which was so troubling to the Court in *Vaca*. 386 U.S. at 182.

Respondent contends that *Vaca* is inapplicable in the federal sector because there was no preexisting judicial remedy for duty of fair representation cases under the Executive Order. Resp.Br. 31. The major problem with respondent's argument is that it ignores the fact that Congress unquestionably intended to revamp federal sector collective bargaining when it passed the CSRA. *Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 92. The appropriate inquiry should thus be directed to the scope of remedies available under the private sector model upon which the duty of fair representation was based, and not to the system which Congress intended to change.[16]

The argument that the need to provide a bulwark against abusive union actions in the federal sector is lessened because federal employment has historically been by appointment (Br. of the United States 27), fails to rec-

[16] The principal reason that the duty of fair representation imposed by the prior Executive Order was not directly cognizable in federal court was because the Order was not a "law of the United States" under 28 U.S.C. § 1331. *Kuhn v. National Ass'n of Letter Carriers*, 570 F.2d 757, 760-61 (8th Cir. 1978).

ognize that collective bargaining, not the appointment system, is the basis of Title VII of the CSRA. 5 U.S.C. § 7101(a); *see* Brower, 40 Okla. L. Rev. at 365-67, 371. Further, federal sector employment can result either from contract or appointment. *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 735 (1982). Most importantly, regardless of the extent of bargaining rights, where the union controls the arbitration mechanism the potential for abuse of that power is just as acute as in the private sector.

CONCLUSION

The scope of the duty arising from the grant of power to a union as exclusive representative is the same in the federal sector as in the private sector. *National Treasury Employees Union v. FLRA*, 800 F.2d at 1171. The need to guard against abuses of that duty is equally compelling whether the union enjoys exclusive bargaining status in the private or federal sector. To paraphrase *Vaca*, the existence of cases like this, in which the FLRA would be unwilling or unable to remedy a union's breach of duty "would frustrate the basic purposes underlying the duty of fair representation doctrine." 386 U.S. at 182-83.

Petitioner submits that Congress must have assumed, and indeed did assume, that in the federal sector a judicial remedy would remain for employees injured by their exclusive representative, just as in the private sector.

Respectfully submitted,

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No. 87-636

In the Supreme Court of the United States

OCTOBER TERM, 1988

EFTHIMIOS A. KARAHALIOS, PETITIONER

v.

DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, PRESIDIO OF MONTEREY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a federal employee who alleges that his exclusive bargaining representative breached its duty of fair representation has a cause of action to bring suit for damages in a federal district court, or whether his exclusive federal remedy is to file an unfair labor practice charge with the Federal Labor Relations Authority.

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INTEREST OF THE UNITED STATES

This case presents the question whether a federal employee who alleges that his exclusive bargaining representative breached its duty of fair representation has a private federal cause of action for damages and therefore may sue the union in federal district court, or whether instead his exclusive federal remedy is to file an unfair labor practice charge with the Federal Labor Relations Authority. The case thus directly involves the rights of federal employees and the functions of a federal agency. This Court, prior to granting the petition for a writ of certiorari, invited the Solicitor General to express the views of the United States in this case.

STATEMENT

1. Petitioner, Efthimios Karahalios, is employed by respondent-employer, Defense Language Institute/

Foreign Language Center, Presidio of Monterey (DLI), as a Greek language instructor (Pet. App. 3a). In 1976, he applied for promotion to a newly created "course developer" position (*ibid.*). As part of the application process, petitioner took a competitive examination (*ibid.*). Based on his test score and other qualifications, DLI initially selected petitioner to fill the "course developer" position (*ibid.*).

Respondent union, the National Federation of Federal Employees, Local 1263, which represents the bargaining unit of which petitioner is a non-union member, subsequently filed a grievance protesting the selection process that DLI used in selecting petitioner for the "course developer" position (Pet. App. 3a). Specifically, respondent union complained that one of the other members of the bargaining unit, Simon Kuntelos, had been demoted from such a course developer position when that position was eliminated in an earlier reorganization of DLI and that Kuntelos was entitled to, but had not received, some non-competitive consideration for the new course developer position (*ibid.*). Respondent union did not advise petitioner that it had filed this grievance (*id.* at 6a). Nor did it advise him when it decided to pursue Kuntelos's grievance to arbitration (*ibid.*). Rather, petitioner learned of the union's actions only after an arbitrator, in August 1977, ordered DLI to reconstitute its "course developer" selection process (in accordance with certain guidelines specified in the award) and to reconsider its promotion of petitioner (*id.* at 3a-4a).

As a result of the arbitrator's ruling, DLI allowed Kuntelos to take the competitive examination that petitioner had taken (Pet. App. 4a). In addition, DLI provided Kuntelos with substantially more time to complete the examination than had been afforded to petitioner

(*ibid.*). Kuntelos received a score on the examination that was two points higher than petitioner had received (*ibid.*). DLI then demoted petitioner—*i.e.*, reduced his grade and pay—and promoted Kuntelos to the course developer position (*ibid.*).[1]

Petitioner objected to his demotion and filed two grievances with DLI, arguing, among other things, that DLI had used improper testing procedures in selecting Kuntelos (Pet. App. 4a; J.A. 85). Petitioner had union representation throughout the grievance process (J.A. 85). DLI denied the grievances (Pet. App. 4a). Petitioner requested that respondent union take his grievances to arbitration, but the union declined to do so; it told petitioner that its earlier arbitral efforts on behalf of Kuntelos precluded it from seeking arbitration on his behalf (*ibid.*).

Petitioner responded by filing with the Federal Labor Relations Authority (FLRA) unfair labor practice charges against both DLI and the union (Pet. App. 4a). He alleged that DLI had breached the collective bargaining agreement by its actions and that respondent union had breached its duty of fair representation by not seeking arbitration on his behalf (*id.* at 5a). The FLRA's General Counsel disagreed with petitioner's breach of contract claim but agreed with the duty of fair representation claim and issued a complaint to that effect against respondent union (*id.* at 4a). But when respondent union agreed to post a notice to all bargaining unit employees, stating that in the future the union would not inform employees that it is unable to represent more than one employee competing for a position, the regional director of the FLRA, without consulting with petitioner, settled the complaint (*ibid.*).

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[1] Kuntelos held the "course developer" position from May 1978 to October 1979, at which time the position was again abolished (Pet. App. 4a).

2. After unsuccessfully appealing the regional director's decision to the FLRA's General Counsel, petitioner filed this suit against DLI and the union in federal district court, alleging that DLI had breached the collective bargaining agreement and that the union had breached its duty of fair representation (J.A. 48-68; see Pet. App. 4a-5a). The district court held that Title VII of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. (& Supp. IV) 7101 *et seq.*, imposes on a union of federal employees an "implied duty of fair representation" and that that implied duty is privately enforceable in federal court under 28 U.S.C. 1331 (J.A. 56-58; see Pet. App. 5a). The court expressly rejected respondents' argument that the CSRA's unfair labor practice provisions and procedures provide the sole means for enforcing the union's duty of fair representation, reasoning that the unfair labor practice provisions and procedures are more concerned with broad public policy than with individuals' claims and thus may not furnish an adequate remedy for the injuries that an individual suffers as a result of a union's breach of its duty of fair representation (J.A. 57-58). The court also held that it could not assume jurisdiction over petitioner's contract claim against DLI (*id.* at 61-62, 69-79, 81; Pet. App. 5a-6a).[2] On the merits, the court ruled that the union had in fact breached its duty of fair representation, but it awarded only attorney's fees and costs, finding that petitioner was not entitled to compensation for lost wages or benefits (J.A. 80-100; Pet. App. 6a).[3]

[2] The court reasoned (J.A. 69-70) that petitioner's breach of contract action was for an amount greater than $10,000 and that, under the Tucker Act (28 U.S.C. 1346(a)(2), 1491), such an action must be brought in the Claims Court. The court granted summary judgment rejecting petitioner's constitutional claims against DLI (see J.A. 81).

[3] The court found fault (J.A. 89-93; Pet. App. 6a) with respondent union's failure to consult with petitioner about its decision to arbitrate

3. The Ninth Circuit reversed the liability finding and ordered the case dismissed (Pet. App. 1a-13a). The court initially observed (*id.* at 7a-8a) that, under *Vaca* v. *Sipes*, 386 U.S. 171 (1967), a private sector employee who is injured by a union's alleged arbitrary refusal to process a grievance can sue the union for breaching its duty of fair representation and can sue the employer, under Section 301 of the Labor-Management Relations Act, 1947 (LMRA), 29 U.S.C. 185, for breaching the collective bargaining agreement. It pointed out that "[t]here is no statutory provision analogous to Section 301 * * * under the CSRA" (Pet. App. 8a). The court then reasoned (*ibid.*) that, although that difference between the CSRA and LMRA, standing alone, would not justify the conclusion that Congress "intended to confer upon unions unlimited discretion," the circumstances of the CSRA's enactment gave added significance to the absence of a CSRA provision permitting private enforcement of the union's duty in federal court. The court explained (*id.* at 9a) that, "[w]hen Congress enacted the CSRA[,] the federal courts had implied a duty of fair representation not only under the National Labor Relations Act[,] as in *Vaca*, but also under the Railway Labor Act[,]" in *Steele* v. *Louisville & N.R.R.*, 323 U.S. 192 (1944); that, "[a]ware of these decisions and aware of how important *Steele*, the seminal case, had been in protecting the rights of racial minorities, Congress itself imposed the duty of fair representation on

on behalf of Kuntelos, with its failure to notify petitioner of the Kuntelos arbitration, and with its decision not to seek arbitration of petitioner's claim without considering its merits. The court awarded no compensation for lost wages or benefits, however, because it found that petitioner and Kuntelos were so evenly matched that it was speculative whether petitioner would have retained the course developer position (J.A. 93-97; Pet. App. 6a). The court did award attorney's fees and costs (J.A. 97-100; Pet. App. 6a).

federal unions"; and that, nevertheless, "Congress * * * failed to provide jurisdiction in the federal courts to enforce the duty" (Pet. App. 9a). The court concluded that, while "*[a]rgumentum ex silentio* is normally weak," "[h]ere the silence of Congress appears to be deliberate" (*ibid.*).

In so concluding, the court noted that, in negotiating the final provisions of the CSRA, the Conference Committee rejected a provision that would have authorized federal courts to order parties to collective bargaining agreements to engage in arbitration (Pet. App. 9a-10a). The court recognized that "the provision which the Conference Committee eliminated did not deal with the claim of an employee against his union" (*id.* at 10a). But the court stated that "the enforcement scheme chosen by Congress showed a strong preference for keeping the interpretation and enforcement of collective bargaining agreements within the process of arbitration, to be reviewed in the first instance by the FLRA" (*ibid.*). The court further noted that "there is an express provision that 'a labor organization which has been accorded exclusive recognition * * * is responsible for representing the interest of all employees in the unit it represents without discrimination' " (*id.* at 10a-11a (quoting 5 U.S.C. 7114(a)(1)) and that the FLRA has "the power to remedy a breach of this duty by awarding back pay * * *" (Pet. App. 11a). Hence, the court concluded, "[t]here is a fit between the duty and the remedy provided" (*ibid.*).

The court also recognized that "the FLRA has been criticized for not enforcing the duty of fair representation vigorously enough" (Pet. App. 11a). But the court noted that "[i]t is of course open to interpretation whether the small number of complaints actually issued reflects lack of zeal or lack of real problems in this area" (*id.* at 12a); hence, there was "insufficient evidence to conclude that

the FLRA does an inadequate job in protecting the rights of the individual worker" (*ibid.*). The court added: "[t]he facts of this case * * * indicate that the existence of a district court remedy after investigation and issuance of a complaint by the General Counsel may lead to a tortuous path of litigation whose costs are disproportionate to the individual benefit achieved and whose protracted twists and turnings must be as disheartening to any eventual winner as they are to any eventual loser" (*id.* at 12a-13a). It thus concluded that, "whether the microcosm of this case is studied or whether the general practice of the FLRA is reviewed, no strong reason appears to overturn what seems to be the congressional intent to channel the grievances of federal employees to the [FLRA]" (*id.* at 13a).

SUMMARY OF ARGUMENT

The court of appeals correctly held that petitioner has no federal cause of action for damages against the union for breach of the union's duty of fair representation. No such cause of action is expressly granted by the CSRA. Accordingly, petitioner may sue respondent for damages in federal court only if a private right of action may be found by implication in the CSRA. We conclude from an analysis of the CSRA, using congressional intent as the focal point (*Thompson* v. *Thompson*, No. 86-964 (Jan. 12, 1988), slip op. 4), that no implied right of action to enforce the duty of fair representation may be found in the CSRA.

The statutory language that imposes the duty of fair representation (5 U.S.C. 7114(a)(1)) merely bans certain conduct; it does not speak of liability on the part of the union, let alone of a right of employees to sue for damages. Moreover, the statute does expressly establish a

comprehensive enforcement scheme, which does not provide for direct access to the courts but directs that complaints such as petitioner's be channeled through the FLRA and its General Counsel. The very existence and specificity of that remedial scheme highlight the absence of a private cause of action; and the nature of the scheme, with its policy of agency primacy, is incompatible with permitting direct access to the federal courts. Further, the legislative history of the CSRA not only contains no evidence of a congressional intent to permit a right of action; it furnishes additional evidence suggesting the exclusivity of the statutory remedies based on a congressional policy against permitting employees to bypass the FLRA.

Although employees in the private sector may sue their unions for breach of the duty of fair representation, there is substantial reason to believe that Congress, in the CSRA, did not intend to transpose the private-sector cause of action into the federal sector. In addition to the considerations of statutory language, structure, and history already adduced, it is the pre-CSRA *federal*-sector law, rather than private-sector law, that is most plausibly understood as the backdrop to the CSRA; and there was no private right of action under pre-CSRA federal-sector law. Moreover, even if the CSRA is to be read against the background of the private-sector law, Congress's departures from certain aspects of that law deserve respect, and they counsel against transposing more of the private-sector model into the CSRA than the statute expressly provides. Thus, in the private sector, both the duty of fair representation and the right of action are implied; yet Congress in the CSRA made the duty express without simultaneously making express a private right of action. And while the absence of an administrative enforcement mechanism in the private-sector statutes (at least as initially enacted) was a principal basis for this Court's recognition of a right to sue in court, Congress carefully included an administrative enforcement mechanism in the CSRA.

Finally, the reasons that this Court gave in *Vaca* v. *Sipes*, 386 U.S. 171 (1967), for recognizing a private right of action under the NLRA do not comparably apply in the federal context. Whereas the courts preceded the federal agency in developing the law under the NLRA, the courts have not entered the field in the federal sector: hence, the value of centralizing initial decisionmaking in an expert agency can be served under the CSRA to an extent not possible under the NLRA. Also, in the federal sector, the recognition of an exclusive bargaining representative does not strip individual employees of substantial pre-existing rights and forms of redress against their employers, as it does in the private sector; there is, therefore, not a corresponding need for direct access to court as a protection for employees. And while in the private sector important practical benefits may be gained by consolidating claims against the union with related federal-court suits against the employer, no such consolidation is possible under the CSRA, which does not authorize comparable suits against the employer in federal court.

ARGUMENT

A FEDERAL EMPLOYEE HAS NO IMPLIED PRIVATE RIGHT OF ACTION IN FEDERAL COURT TO SEEK DAMAGES FOR HIS EXCLUSIVE BARGAINING REPRESENTATIVE'S BREACH OF ITS DUTY OF FAIR REPRESENTATION

We start from the proposition, which neither petitioner nor respondent union appears to dispute (Pet. 10-12; Br. in Opp. 4-5; Pet. Reply Br. 3-4; Pet. Br. 2), that Section 7114(a)(1) of the CSRA codifies a duty of fair representa-

tion for federal-sector unions that is similar if not identical to the duty of fair representation that the courts have found implicit in the exclusive bargaining power granted to private-sector unions by the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, and the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*[4] We also assume, what is likewise not disputed (see, *e.g.*, Pet. Br. 10-11; Pet. 10-12; Br. in Opp. 4-5), that the duty of fair representation is enforceable by the FLRA and its General Counsel through the unfair labor practice provisions and procedures set forth in Sections 7116(b) and 7118 of the CSRA.[5]

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[4] Section 7114(a)(1) of the CSRA (5 U.S.C.) provides:

> A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

Several courts, as well as the FLRA itself, have held that that provision fully codifies for the federal sector the duty of fair representation that has been established in the private sector by implication under the NLRA and the RLA. *See AFGE* v. *FLRA*, 812 F.2d 1326 (10th Cir. 1987); *National Treasury Employees Union* v. *FLRA*, 800 F.2d 1165 (D.C. Cir. 1986); *Ft. Bragg Ass'n of Educators*, 28 F.L.R.A. No. 118 (Sept. 4, 1987). We assume, for purposes of this case, that the provision in fact does so.

[5] Section 7116(b) of the CSRA (5 U.S.C.) provides, in pertinent part:

> For the purposes of this chapter, it shall be an unfair labor practice for a labor organization–
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> • • • • •
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.
>
> • • • • •

Section 7118 of the CSRA (5 U.S.C.) provides, in pertinent part:

> (a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the change a written statement of the reasons for not issuing a complaint.
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> • • • • •
>
> (7) If the Authority • • • determines after any hearing on a complaint • • • that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order–
>
> (A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;
>
> (B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;
>
> (C) requiring reinstatement of an employee with backpay in accordance with section 5596 or this title; or
>
> (D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.
>
> If any such order requires reinstatement of an employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.
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> • • • • •

The question that is in dispute, and as to which the courts of appeals are in conflict,[6] is whether the CSRA's express duty of fair representation is also enforceable by a federal employee in a federal court action for money damages and other relief.[7]

We believe that the court of appeals correctly ruled that a federal employee has no private right of action to sue a federal-sector union in federal court for breach of its duty of fair representation. Although the evidence of congressional intent is not clear-cut, it appears, on balance, that Congress intended that the duty of fair representation applicable to federal-sector unions would be enforced exclusively by the General Counsel of the FLRA, under the unfair labor practice provisions and procedures set forth in Sections 7116 and 7118 of the CSRA.

A. Petitioner has no express right of action to sue respondent union in federal court for breach of the duty of fair representation. Although the CSRA codifies a duty of

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[6] Compare *Pham* v. *AFGE, Local 916,* 799 F.2d 634 (10th Cir. 1986), and *Naylor* v. *AFGE Local 446,* 580 F. Supp. 137 (W.D.N.C. 1983), aff'd without opinion, 727 F.2d 1103 (4th Cir.), cert. denied, 469 U.S. 850 (1984), with Pet. App. 1a-13a (9th Circuit) and *Warren* v. *Local 1759, AFGE,* 764 F.2d 1395 (11th Cir.), cert. denied, 474 U.S. 1006 (1985), and *Wilson* v. *United States Bureau of Prisons,* 770 F.2d 1078 (3d Cir 1985) (Table), aff'g 585 F. Supp. 202 (M.D. Pa. 1984).

[7] Whether a violation of the duty of fair representation is an unfair labor practice is a question presumably within the exclusive jurisdiction of the FLRA. Cf. *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236 (1959). It is a separate question whether Congress intended to create an " 'independent federal remedy' " for a violation of the duty of fair representation. See *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.,* No. 85-2079 (Feb. 23, 1988), slip op. 3 n.4; *Kaiser Steel Corp.* v. *Mullins,* 455 U.S. 72, 83 (1982); *Connell Constr. Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 626 (1975).

fair representation (5 U.S.C. 7114(a)(1)), it does not expressly make that duty (or any other statutory duty) directly enforceable by a federal employee in a federal or state court action. Indeed, the labor-management-relations chapter of the CSRA—namely, Title VII (5 U.S.C. Ch. 71)—expressly empowers courts to act in only three instances: *first,* where a person is aggrieved by a final order of the FLRA (5 U.S.C. 7123(a)); *second,* where the FLRA petitions an appropriate court of appeals for enforcement of one of its orders or for appropriate temporary relief or a restraining order (5 U.S.C. 7123(b)); and *third,* where, upon issuing an unfair labor practice complaint, the FLRA petitions a federal district court for temporary injunctive relief (5 U.S.C. 7123(d)). Cases like the present one fall into none of those categories.

Accordingly, the duty of fair representation may be directly enforced by a federal employee in a federal court action only if a private cause of action for enforcement of the duty can be found by implication in the CSRA.[8] In determining whether a private cause of action is implied by a federal statute, the "focal point" for analysis, the Court has said, "is Congress' intent in enacting the statute." *Thompson* v. *Thompson,* No. 86-964 (Jan. 12, 1988), slip op. 4. "Factors relevant to this inquiry are the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies." *Northwest Airlines, Inc.* v. *Transport Workers Union,* 451 U.S. 77, 91 (1981). See also *Thompson* v. *Thompson,* slip op. 4-5; *Daily Income*

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[8] If such a cause of action can be found by implication in the CSRA, then 28 U.S.C. 1331 would provide federal court jurisdiction.

Fund, Inc. v. *Fox,* 464 U.S. 523, 535-536 (1984); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n,* 453 U.S. 1, 13 (1981). Following that approach, we now explain why we think that the CSRA provides an insufficient basis for finding a private cause of action for breach of the duty of fair representation.

B. 1. The language of the statute contains not even a hint that Congress intended to give federal employees the right to enforce the duty of fair representation in federal or state court actions. Section 7114(a)(1) of the CSRA provides only that "[a]n exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." That statutory language does not "explicitly confer[] a right directly on" individual federal employees. *Cannon* v. *University of Chicago,* 441 U.S. 677, 690 n.13 (1979). Rather, it contains only "a ban on discriminatory conduct" by exclusive bargaining agents (*id.* at 691-693).

To be sure, the statutory ban on discriminatory conduct confers a benefit on the federal employees whom the exclusive bargaining agents represent. But "[t]he question is not simply who * * * benefit[s] from the Act" (*California* v. *Sierra Club,* 451 U.S 287, 294 (1981)); some persons presumably benefit from the imposition of every statutory duty, including those not privately enforceable. The question, instead, is whether Congress intended that the federally conferred benefit "would be enforced through private litigation." *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 18 (1979). And the Court has consistently held that statutory language of the type present here, which merely confers a statutory benefit on a particular class of persons and does not create any liability, does not in itself give rise to an inference that Congress intended to create a private cause of action for enforcement

of the statutory benefit by those persons. See, *e.g., Massachusetts Mut. Life Ins. Co.* v. *Russell,* 473 U.S. 134, 145 (1985) (statute imposing liability for breach of fidicuary duties does not confer on beneficiaries of benefit plans a private cause of action for non-contractual money damages); *Universities Research Ass'n* v. *Coutu,* 450 U.S. 754, 771-784 (1981) (statutory requirement that certain federal construction contracts contain a stipulation that laborers and mechanics will be paid "prevailing wages" does not confer on employees a private cause of action for back wages); *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. at 17-22 (statute proscribing certain fraudulent practices by investment advisors does not confer on clients of investment advisors a private cause of action for money damages).

2. "The structure of the statute[ ] similarly counsels against recognition of the implied right petitioner advocates in this case" (*Northwest Airlines, Inc.* v. *Transport Workers Union,* 451 U.S. at 93). This is not a case in which the statute shows little or no attention to the question of enforcement of the prescribed duties. The CSRA carefully specifies how and by whom the duty of fair representation is to be enforced. The nature and specificity of that statutory enforcement scheme counsel against the finding of implied remedies to supplement that scheme.

The CSRA provides that it is "an unfair labor practice for a labor organization * * * to * * * fail or refuse to comply with any provision of [Chapter 71 of 5 U.S.C.]" (5 U.S.C. 7116(b)(8)). That provision plainly encompasses the codified duty of fair representation found in Section 7114(a)(1) of the statute. The CSRA further provides a carefully crafted procedure for seeking a remedy for an unfair labor practice: thus, Section 7118 authorizes the General Counsel of the FLRA to investigate unfair labor practice charges, to issue complaints with respect to

alleged unfair labor practices, and to seek backpay and other remedial orders from the FLRA for aggrieved federal employees.[9] Finally, the statute contains an equally specific provision governing judicial review (5 U.S.C. 7123). It provides that private persons may obtain judicial review only with respect to final orders of the FLRA (5 U.S.C. 7123(a))[10]; that, in such appeals, the FLRA's findings of fact are to be conclusive if supported by substantial evidence (5 U.S.C. 7123(c)); and that "[n]o objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances" (5 U.S.C. 7123(c)).

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[9] When, after the General Counsel pursues a complaint, the FLRA is called on to decide the merits and finds that a labor organization has breached its duty of fair representation, the FLRA has broad remedial discretion under 5 U.S.C. 7105(g)(3). The FLRA exercises that authority where appropriate to grant "make whole" relief to any employee adversely affected by the union's breach of duty. See, *e.g.*, *Int'l Ass'n of Machinists & Aerospace Workers, Local 39*, 24 F.L.R.A. 352 (1986) (where union erroneously failed to file grievance over employee's suspension, union was ordered to pay employee his lost earnings if it was unable to obtain employer's permission to file grievance out of time); *AFGE, Local 1857*, 28 F.L.R.A. (No. 86) 677 (Aug. 21, 1987) (where union discriminatorily excluded unit employee from grievance settlement concerning backpay for overtime work negotiated with employer, union ordered to pay the employee backpay if it was unable to secure backpay for the employee from the employer).

[10] For example, in this case, if the FLRA had decided the merits of petitioner's complaint adversely to him or failed to award adequate relief, he could have sought judicial review of the FLRA's final order in an appropriate court of appeals.

If the FLRA had found that the union breached its duty and ordered a remedy, and the union then failed to comply with the order, the FLRA could have sought enforcement of the order in an appropriate court of appeals under 5 U.S.C. 7123(b).

Where other statutes have contained such comprehensive and integrated enforcement schemes, the Court has said that private causes of action should not be found by implication. See, *e.g.*, *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. at 146-147 & n.15; *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 18-19; *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 571-574 (1979); *National R.R. Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974). Rather, "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement" (*Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. at 97). That presumption applies in this case, not only because of the completeness of the CSRA's enforcement scheme, but because recognizing the particular remedy that petitioner suggests may be found by implication (direct action in court) would work a striking departure from the statutory enforcement scheme, which channels claims like petitioner's through a specialized administrative agency.

3. No statement made in the legislative history of the CSRA speaks directly to the question presented here. But a number of statements made and actions taken in the proceedings leading to enactment of the statute tend to confirm the exclusivity-of-FLRA-review policy that is suggested by the express terms of the enforcement scheme. Thus, the legislative history suggests that Congress intended that the duty of fair representation would be enforced exclusively at the instance of the General Counsel of the FLRA, under the unfair labor practice provisions and procedures established in Sections 7116 and 7118 of the CSRA.[11]

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[11] As petitioner observes (Pet. Br. 23-24), Representative Ford expressly referred to the duty of fair representation, stating (124 Cong.

First, in discussing the availability of judicial review for actions arising under the CSRA, the House Report states that "the General Counsel of the Authority makes the final decision as to the issuance of a complaint of an unfair labor practice." H.R. Rep. 95-1403, 95th Cong., 2d Sess. 52 (1978). In addition to thus underscoring the intended pivotal role of the FLRA General Counsel, the House Report also highlights the intended exclusivity of the express statutory mechanisms for judicial review (as described above): "Only those labor-management relations matters specifically referred to in section 7123 shall be judicially reviewable." *Ibid.* The Senate Report similarly expresses a commitment to channeling of challenges like petitioner's through the FLRA, stating: "All complaints of unfair labor practices • • • that cannot be resolved by the parties shall be filed with the FLRA." S. Rep. 95-969, 95th Cong., 2d Sess. 107 (1978). Finally, as the court below noted (Pet. App. 9a-10a), the Conference Committee took action that further suggests the incompatibility with the CSRA of a judicially found implied cause of action for direct judicial review of disputes growing out of collective bargaining agreements. The House proposed a provision that would have authorized direct action in federal court by a party to a collective bargaining agreement for an order directing the other party to engage in arbitration. The Conference Committee rejected that provision, explaining: "All questions of this matter will be considered at least in the first instance by the [FLRA]." H.R. Rep. 95-1717, 95th Cong., 2d Sess. 157 (1978).

Rec. 38717 (1978)): "The labor organization is required to meet a duty of fair representation for all employees, even if not dues-paying members, who use the negotiated grievance procedure." That statement merely asserts the existence of the duty. It does not address the question of direct judicial enforcement through a private cause of action.

This legislative history is difficult to reconcile with recognition of a private cause of action for enforcement of the duty of fair representation. If such a cause of action were recognized, a federal employee presumably could completely bypass both the unfair labor practice provisions and procedures and the expert administrative agency that administers them. Yet the congressional history strongly suggests that Congress contemplated a channeling of all disputes over alleged unfair labor practices through the FLRA. The evidence of that understanding supplies "one more piece of evidence that Congress did not intend to authorize a cause of action" (*Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 22).

Adding an implied right of action to the statutory enforcement scheme would also tend to frustrate one of Congress's more general purposes in the CSRA, a purpose that this Court explained and relied on in *United States* v. *Fausto*, No. 86-595 (Jan. 25, 1988). The Court there held that a non-veteran, excepted service federal employee could not challenge a 30-day suspension in the Claims Court, even though a pre-CSRA remedy existed and the CSRA provides *no* alternative administrative or judicial remedy. In reaching that conclusion, the Court emphasized that the CSRA's legislative history strongly reflected congressional dissatisfaction with the " 'wide variations in the kinds of decisions • • • issued on the same or similar matters,' " "which were the product of concurrent jurisdiction, under various bases of jurisdiction, of the district courts in all Circuits and the Court of Claims" (slip op. 5 (citation omitted)). And the Court observed (slip op. 9-10 (quoting S. Rep. 95-969, *supra*, at 52)) that the primacy of the Merit System Protection Board and the Federal Circuit in certain matters serves the congressional purpose of "enabl[ing] the development, through the MSPB, of a unitary and consistent Executive Branch position on matters

involving personnel action, avoids an 'unnecessary layer of judicial review' in lower federal courts, and '[e]ncourages more consistent judicial decisions * * *.' " In the present context, although the courts of appeals play a role in the development of the duty of fair representation (through review of FLRA orders under Section 7123), the primacy of the FLRA and its General Counsel in the definition and enforcement of the union's duties serves much the same policies.

4. In his brief, petitioner does not directly undermine the force of the foregoing considerations. Rather, petitioner's argument rests on the contention that Congress must have intended to borrow for the federal employment context the implied right of action recognized in the private context. In particular, petitioner suggests that the policies that underlie this Court's recognition of such a cause of action in the private setting apply under the CSRA as well.

To be sure, when Congress enacted the CSRA and its express duty of fair representation, this Court had previously recognized implied causes of action under both the NLRA and the RLA for enforcement of the duty of fair representation applicable to private-sector unions. See *Vaca* v. *Sipes*, 386 U.S. 171 (1967) (NLRA); *Steele* v. *Louisville & N.R.R.*, 323 U.S. 192 (1944) (RLA). This Court has said that, "[w]hen Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts," the relevant "question is whether Congress intended to preserve the pre-existing remedy." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 378-379 (1982). See also *Cannon* v. *University of Chicago*, 441 U.S. at 696-699. But, in the present context, Congress did not act against the background of a pre-existing remedy in the federal sector, only the analogy to such a remedy in the private sector; and the

policies underlying the private-sector remedy do not carry over with comparable force to the federal sector. Accordingly, there is substantial reason to believe that Congress did not intend to extend the private-sector cause of action to the federal sector.

a. The principle that a new statute presumptively carries forward a pre-existing remedy does not apply here. Prior to the enactment of the CSRA in 1978, federal-sector labor relations were governed by executive orders. Exec. Order No. 10,988, 3 C.F.R. 521 as amended by subsequent executive orders (see Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Order Nos. 11,616, 11,636, and 11,838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.)). See Brower, *The Duty of Fair Representation Under the Civil Service Reform Act: Judicial Power to Protect Employee Rights*, 40 Okla. L. Rev. 361, 369-371 (1987); see generally *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 91-93 (1983). When the CSRA was enacted, the courts had almost uniformly held that the provisions of the Executive Orders were not judicially enforceable (because the Executive Orders were not "law[s] of the United States" within the meaning of 28 U.S.C. 1331). See, *e.g.*, *Stevens* v. *Carey*, 483 F.2d 188, 190 (7th Cir. 1973); *Local 1498, AFGE* v. *AFGE*, 522 F.2d 486, 491 (3d Cir. 1975); *Kuhn* v. *National Ass'n of Letter Carriers*, 570 F.2d 757, 760-761 (8th Cir. 1978). See generally *United States* v. *Professional Air Traffic Controllers Org.*, 653 F.2d 1134, 1137 (7th Cir. 1981), cert. denied, 454 U.S. 1083 (1981). Hence, the pre-CSRA law applicable to federal employees did not include a private right of action to enforce unions' duty of fair representation. Congress did not expressly alter that law.

Petitioner's premise, of course, is that the analogy to the private-sector labor law should suffice for finding an implied right of action in the CSRA. But it is at least equally

plausible that the 1978 Congress viewed the pre-CSRA *federal*-sector law as the backdrop to its legislation. Indeed, the discussions of the CSRA's labor-management-relations provisions in the congressional committee reports provide far more support for the latter approach to construing the CSRA than for the former (see S. Rep. 95-969, *supra*, at 97-115; H.R. Rep. 95-1403, *supra*, at 38-62; H.R. Rep. 95-1717, *supra*, at 152-159); and this Court has generally looked to pre-CSRA federal-sector law in construing the CSRA (see, *e.g.*, *United States* v. *Fausto*, *supra*; *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. at 100-107). More particularly, the language of Section 7114(a)(1) of the CSRA, which creates an express duty of fair representation that is similar if not identical to the implied duty of fair representation under the NLRA and the RLA, is taken almost verbatim from Exec. Order No. 11,491.

In any event, even if Congress understood the NLRA and RLA caselaw as part of the "contemporary legal context" in which it enacted Section 7114(a)(1) (cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. at 381), the language, structure, and legislative history of the CSRA, as discussed above, suggest that Congress may have made a considered judgment *not* to create an analogue to the private cause of action for the enforcement of the duty of fair representation recognized by the courts in NLRA and RLA cases. Thus, whereas both the duty of fair representation and the private right of action for its enforcement are merely *implied* under the NLRA and RLA, Congress included in the CSRA a provision (5 U.S.C. 7114(a)(1) (second sentence)) that renders express only the duty, not the private right of action. Moreover, neither the RLA, nor the NLRA as originally enacted, contained any administrative mechanism for enforcing a duty of fair representation against unions, and the absence

of an administrative remedy was a principal reason this Court offered for finding private rights of action implied by those statutory schemes. See *Vaca* v. *Sipes*, 386 U.S. at 180-183; *Steele* v. *Louisville & N.R.R.*, 323 U.S. at 205-207. See generally *Cannon* v. *University of Chicago*, 441 U.S. at 733-734 (Powell, J., dissenting). In the CSRA, by contrast, Congress expressly established such an administrative mechanism for enforcing the duty of fair representation.

In short, Congress expressly made violation of the duty of fair representation an unfair labor practice enforceable through a specified administrative process without simultaneously expressly providing for a judicial cause of action. As we have explained, that combination suggests, even without reference to the NLRA and RLA, that Congress considered private litigation to be an inappropriate means of enforcing the duty. See *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 20-21; cf. *Bush* v. *Lucas*, 462 U.S. 367, 388-390 (1983) (no judicial damage remedy for a wrong that can be remedied through the comprehensive scheme established by the CSRA). But it also suggests that, if, as petitioner proposes, Congress had its eye on the private-sector statutes and caselaw when enacting the CSRA, Congress's departures from the private-sector model should be respected.

b. That the private-sector model is not a sufficient basis for finding an implied right of action in the federal sector is further supported by recognition of the limited extent to which the analysis used by this Court in upholding a private right of action in *Vaca* v. *Sipes*, *supra*, carries over to the CSRA context. In *Vaca*, this Court held that, when Congress amended the NLRA to add an unfair labor practice provision that the National Labor Relations Board (NLRB) later interpreted to address duty of fair representation issues, Congress did not implicitly repeal

the private cause of action that the courts had previously recognized under that statute. The Court gave three reasons: (a) "[a] primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation" (386 U.S. at 180-181); (b) "the unique interests served by the duty of fair representation doctrine" in the NLRA context would be frustrated by refusal to recognize a private right of action under that statute (*id.* at 181-183); and (c) "intensely practical considerations • • • emerg[ing] from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining [agreements]" favor recognition of a judicial cause of action for enforcement of the duty of fair representation (*id.* at 183-188). But each of those reasons is largely or wholly inapplicable in the CSRA context, which further suggests that Congress did not intend that the CSRA's duty of fair representation would be enforced through private litigation.

First, in the CSRA context, the principal justification for making the administrative remedy exclusive—*i.e.*, avoidance of conflicting rules and reliance on administrative expertise—applies with full force to the duty of fair representation. Under the NLRA, the courts began developing the doctrine that became the duty of fair representation well before the NLRB had any basis for assuming jurisdiction over such cases. By contrast, the CSRA specifically directs the FLRA to define and enforce the duty of fair representation applicable to federal-sector unions, and the FLRA has been active from the statute's inception in doing so. See, *e.g.*, *National Treasury Employees Union*, 10 F.L.R.A. No. 91 519 (Nov. 23, 1982),

aff'd, 721 F.2d 1402 (D.C. Cir. 1983); *National Federation of Federal Employees*, 24 F.L.R.A. 320 (1986), petition for review dismissed *sub nom. Thompson* v. *FLRA*, 830 F.2d 1130 (11th Cir. 1987) (Table). In the federal sector, no judicial presence preceded the administrative presence. Hence, the question presented is not, as it was in *Vaca* v. *Sipes*, whether Congress intended to "oust the courts of their traditional jurisdiction" (386 U.S. at 183); the question here is quite different—whether there is a basis for inferring congressional intent to grant a direct role to the federal courts when no such grant was made explicit.

Accordingly, in the CSRA setting there is no impediment to giving effect to an evident statutory commitment to the primacy of agency decisionmaking in this area. To be sure, the courts play a role in developing and enforcing the duty of fair representation through review of FLRA orders under 5 U.S.C. 7123. But judicial review under the provision is carefully limited to circumstances in which the FLRA has had an opportunity to act first. The entry of the courts directly into this field of decisionmaking can only produce confusion and inconsistency.

As a practical matter, moreover, there can be no doubt that the FLRA brings substantial pertinent expertise to the area. Section 7117 of the CSRA charges the FLRA (and not the courts) with the responsibility for making "negotiability" determinations; that responsibility provides the FLRA with considerable insight into how a union formulates bargaining proposals and the reasons why a union engages in particular give-and-take at the bargaining table. In addition, whereas in the private sector courts directly review arbitration awards in actions brought under Section 301 of the LMRA, the situation is different in the federal sector: Section 7122 of the CSRA (5 U.S.C. (& Supp. IV)) charges the FLRA (and not the courts), with certain exceptions, with the responsibility for reviewing

arbitration awards. Through this process, the FLRA has gained experience with union grievance and arbitration practices—experience that the courts cannot hope to duplicate.

Second, in the CSRA context, declining to supplement the unfair labor practice provisions with a private cause of action will not seriously undermine the substantial "unique interests" that the duty of fair representation doctrine serves. The Court in *Vaca* v. *Sipes* stressed that, in the private sector at issue there, the statutory grant of exclusive bargaining power to unions deprives individuals of their pre-existing right to make and enforce contracts with their employers. The duty of fair representation thus stands "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law" (*Vaca* v. *Sipes,* 386 U.S. at 182). But the same cannot be said of the CSRA context, for, while some employees might of course fare better in the federal sector without recognition of an exclusive bargaining representative, recognition of an exclusive representative in the federal sector does not result in the same loss of pre-existing rights as it does in the private sector.

To begin with, in the federal-sector, employment is a result of appointment, not of contract. See, *e.g., Army & Air Force Exch. Serv.* v. *Sheehan,* 456 U.S. 728, 735-741 (1982). Thus, the employee generally has no right to make or enforce an individual contract of employment with his agency-employer (see, *e.g.,* 48 C.F.R. 37.104(a) and (b)), and hence the employee is not stripped of any such rights by the recognition of an exclusive bargaining representative. Moreover, the exercise of exclusive bargaining power by the union cannot deprive any individual of otherwise-available mechanisms for challenging employment actions like that at issue here. Thus, Section 7114(a)(5) precludes

the exclusive representation rights of a union from being construed to bar any individual from exercising any "grievance or appellate rights established by law, rule, or regulation." See *National Treasury Employees' Union* v. *FLRA,* 800 F.2d 1165, 1170 (D.C. Cir. 1986). And Section 7121(e)(1) makes clear that an employee aggrieved by an "adverse action," including a removal, reduction in grade or pay (as here), or suspension for more than 14 days, has the option to bypass the grievance procedure specified in the collective bargaining agreement and to pursue instead the statutory appeals procedure under Section 7701. See *Morales* v. *MSPB,* 823 F.2d 536, 538 (Fed. Cir. 1987); see also *Devine* v. *Pastore,* 732 F.2d 213, 216 (D.C. Cir. 1984) (standards of review by arbitrator and by MSPB are the same). Hence, recognizing an exclusive bargaining representative in the federal sector simply does not strip employees of the same kinds of pre-existing rights that recognizing a union in the private sector does.[12] In particular, petitioner has not suggested how the CSRA deprived him of any rights he would otherwise have had or have been contractually able to obtain against his employer with respect to the promotion at issue. See *United States* v. *Testan,* 424 U.S. 392 (1976); *Arnett* v. *Kennedy,* 416 U.S. 134 (1974).

Accordingly, while the duty of fair representation stands as a desirable bulwark against arbitrary and capricious union action in the federal sector, a private right of action would not play the same critical role in the federal sector that it does in the private sector. To the ex-

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[12] Substantively, too, the range of matters that are within the scope of collective bargaining in the federal sector is substantially narrower than in the private sector. See, *e.g.,* 5 U.S.C. 7106 (management rights provision covering, among other things, authority to hire, to fire, to assign work, to discipline), 7117 (limiting bargaining as to matters within scope of federal laws, rules, or regulations). See *FLRA* v. *Aberdeen Proving Ground,* No. 86-1715 (Apr. 4, 1988).

tent that the private cause of action was deemed necessary in the private sphere because the grant of exclusive representation authority deprives employees of pre-existing (judicially enforceable) rights against the employer, that need is appreciably less in the federal sphere because there is no comparable sacrifice of rights. The focus, therefore, must simply be on enforcing the duty of fair representation as a restriction on unions; and there is every reason to believe that the duty can effectively be enforced in the same manner as any other limitation on the power of federal-sector unions—by the General Counsel of the FLRA, using his discretionary authority under the unfair labor practice provisions and procedures of the CSRA. Cf. *Vaca* v. *Sipes*, 386 U.S. at 182-183 (unreviewable discretion of NLRB General Counsel significant *because* employees are deprived of pre-existing forms of redress by enactment of federal labor laws).[13]

[13] As the court below recognized (Pet. App. 11a-12a), there is no basis for suggesting that the General Counsel of the FLRA has failed to enforce the duty of fair representation. See also *Warren* v. *Local 1759, AFGE*, 764 F.2d at 1399 n.6 ("unpersuaded by Appellant's argument that the FLRA lacks zeal in prosecution of duty of fair representation claims"). Indeed, we are advised by the FLRA General Counsel's Office that, from 1984 to the present, the percentage of complaints issued against unions in cases charging violations of the duty of fair representation has been approximately the same as the percentage of complaints issued against unions arising out of all charges filed for any reason. In all events, as we have noted in the text, Congress appears to have intended in the CSRA that federal employees would be subject to the General Counsel's unreviewable discretion on duty of fair representation charges (and all other unfair labor practice charges). Cf. *Redington*, 442 U.S. at 568 (citation omitted) (" 'the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person' ").

In this case, we note, the General Counsel settled the unfair labor practice charge without awarding petitioner individual relief because he concluded that, in the circumstances presented here, the union had no duty to invoke arbitration on behalf of petitioner. See First Amended Complaint, Exh. 19 (letter date Nov. 24, 1980, to petitioner's counsel from Assistant General Counsel for Appeals). The reasonableness of the settlement is shown by the district court's finding that petitioner and Mr. Kuntelos were so evenly matched that petitioner was not entitled to direct compensation for loss of the job at issue. See note 3, *supra*.

Third, in the federal sector, recognition of a private cause of action for enforcement of the duty of fair representation is not supported by "intensely practical considerations" that emerge from the relationship between the duty of fair representation and the enforcement of collective bargaining agreements. Those practical considerations arise in the private sector because collective bargaining agreements are enforceable in court under Section 301 of the LMRA, 29 U.S.C. 185. Recognizing an independent cause of action for enforcement of the duty of fair representation allows the courts to consolidate such claims with breach of contract actions and to fashion comprehensive and appropriate remedies. See *Vaca* v. *Sipes*, 386 U.S. at 187-188; see also *Bowen* v. *United States Postal Service*, 459 U.S. 212 (1983) (damages to be apportioned between employer and union).

The CSRA, however, does not contain an equivalent to Section 301 of the LMRA. And, as we have noted (page 18, *supra*), the Conference Committee specifically rejected a provision that would have allowed courts to entertain an important class of such suits (those involving efforts to compel arbitration). It did so, moreover, precisely in order to ensure that "[a]ll questions of this matter will be considered at least in the first instance by the Authority" (H.R. Rep. 95-1717, *supra*, at 157).

Hence, the practical benefits associated with the recognition of a private right of action to enforce the duty of

fair representation in the private sector would not be achieved in the federal sector.[14] Rather, it is the practical benefits of channeling claims like petitioner's through a single agency that Congress is best understood as having tried to achieve. Recognition of an implied right of action is not compatible with that goal.

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[14] The comprehensiveness of the CSRA, combined with the absence of an express provision authorizing suits for breach of the collective bargaining agreement, precludes a suit for that purpose against the agency-employer. Cf. *United States* v. *Fausto, supra.* Moreover, at least two courts have held that the Tucker Act (28 U.S.C. 1346(a)(2), 1491) does not provide a basis for an action against an agency-employer for violating its collective bargaining agreement. See *Serrano Medina* v. *United States*, 709 F.2d 104 (1st Cir. 1983); *Yates* v. *Soldiers' & Airmen's Home*, 533 F. Supp. 461, 465 n.8 (D.D.C. 1982); see also *Leath* v. *Stetson*, 686 F.2d 769 (9th Cir. 1982). Even if the Tucker Act provided such a basis, however, any claim for more than $10,000 would lie only in the Claims Court, which plainly could not provide a remedy for a breach of the duty of fair representation because the union would not be a party. See J.A. 71 n.1. Thus, proceedings would be bifurcated in many cases, even if the employer-agency could be sued in court on the contract.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 87-636

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

EFTHIMIOS A. KARAHALIOS,
Petitioner,
v.
DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, PRESIDIO OF MONTEREY, and LOCAL 1263, NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

Whether an employee of the federal government has a private right of action in federal district court to claim that his union has violated its statutorily prescribed duty of fair representation, or whether he must seek redress through the administrative procedure provided by the statute.

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BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

INTEREST OF THE AMICUS

Amicus, National Treasury Employees Union (NTEU), is a federal sector labor organization that is the exclusive bargaining representative of over 140,000 federal employees nationwide. NTEU represents the interests of members of its bargaining units by, *inter alia*, negotiating collective bargaining agreements with agency employers and by arbitrating grievances under the agreements. In addition, NTEU frequently conducts litigation on behalf of the employees it represents, seeking to vindicate their statutory and constitutional rights, before both administrative and judicial tribunals.

This case concerns the construction of Title VII of the Civil Service Reform Act of 1978. Pub. L. No. 95-454, 92 Stat. 1111, *et seq.* (CSRA). The specific issue before

the Court is whether that Act confers upon federal employees a direct judicial cause of action to remedy violations by federal sector unions of the statutorily created duty of fair representation. NTEU has a vital interest in the Court's resolution of this issue, both because of its status as a federal sector labor union, and because of its general commitment to ensuring that federal employees enjoy access to the federal courts to vindicate their statutory and other rights, where appropriate. Because this Court's decision will necessarily address the question whether unions like NTEU are subject to suit in district court when a violation of the duty of fair representation is claimed, and because resolution of this narrow issue may involve consideration of the extent to which Title VII limits employees' access to the federal courts generally, NTEU submits this brief to assist the Court in its review of this case.[1]

STATEMENT

1. This case arose out of a claim by Efthimios Karahalios that his union, the National Federation of Federal Employees, Local 1263 (NFFE), improperly refused to arbitrate a grievance he had filed against his employer, the Defense Language Institute (DLI). Pet. App. 4a. The underlying grievance involved a promotion to a newly created position, which DLI gave Mr. Karahalios in early 1977, and which it cancelled in May, 1978. J.A. 82, 85. DLI cancelled the promotion after another employee, Simon Kuntulos, filed a grievance which successfully challenged the procedures used to promote Karahalios, and then gained the position when the Agency reopened the decision. Pet. App. 3a-4a. As the court of appeals noted, however, Kuntulos success was "short

[1] Pursuant to Rule 36 of the Rules of this Court, all current parties have consented to the filing of this brief. Their letters of consent are lodged with the Court.

lived," as his new position was abolished 18 months later in October, 1979. Pet. App. 4a.

After DLI gave Kuntulos the position, Karahalios himself filed a grievance against DLI, challenging the procedures DLI used in selecting Kuntulos. J.A. 85. NFFE processed the grievance. The union, however, refused to take the grievance to arbitration on the advice of counsel that this would constitute a "conflict of interest" with the union's earlier representation of Kuntulos. J.A. 86.

In May, 1979, Karahalios filed unfair labor practice charges against DLI and NFFE with the Federal Labor Relations Authority (FLRA). J.A. 50. The FLRA's General Counsel ordered that a complaint be issued against NFFE in June, 1980, alleging that the union had violated its statutorily imposed duty of fair representation (DFR). 5 U.S.C. §§ 7114(a)(1), 7116(b)(8). Shortly thereafter, the FLRA Regional Director and NFFE settled the complaint. J.A. 87. In the settlement agreement, NFFE agreed to notify all members of its bargaining unit that it would not inform employees that it could only represent one employee where two or more employees are seeking one position. J.A. 87-88. The settlement did not provide any individual relief for Karahalios.

2. In October, 1981, two years after the position he sought had been abolished, Karahalios brought this action in district court against both DLI and NFFE, alleging violations of law, regulation and the Constitution. J.A. 4-14. NFFE filed a motion to dismiss the action on the grounds that the district court lacked jurisdiction over Karahalios' duty of fair representation suit. It argued that Title VII of the Civil Service Reform Act of 1978, which expressly creates the duty of fair representation in the federal sector, also provides the exclusive remedy for its violation—namely, pursuit of a complaint through the Federal Labor Relations Authority, with judicial review in the courts of appeals. J.A. 55.

The district court denied NFFE's motion to dismiss. J.A. 58.[2] After a June, 1984 trial, the court issued an opinion on the merits holding that NFFE had breached its duty of fair representation to Karahalios by not considering his interests when it represented Kuntelos, by not notifying him of the Kuntelos arbitration, and by not taking his grievance to arbitration. J.A. 89-92. The Court, however, refused to award Karahalios any individual relief (except attorney fees), because it found that the two employees vying for the promotion "were simply too evenly matched" for the court to determine that Karahalios would have been successful in gaining the promotion had the union invoked arbitration on his behalf. J.A. 95.

3. The court of appeals reversed. Pet. App. 3a. It held that the district court lacked jurisdiction over Karahalios' claims against the Union. The court noted that in *Vaca* v. *Sipes*, 386 U.S. 171 (1967), this Court had ruled that a private sector employee may sue directly in federal district court to enforce the union's duty of fair representation. Pet. App. 7a. However, it concluded that Congress deliberately decided not to apply that rule in the federal sector, when it enacted Title VII of the CSRA and instead decided to treat violations of the duty of fair representation as unfair labor practices that must be decided by the Federal Labor Relations Authority in the first instance, with subsequent review in the courts of appeals. Pet. App. 7a.

The court of appeals observed that Congress' decision not to allow district court review of arbitration matters, but instead to vest review authority in the FLRA, indicated a departure from the scheme of the National Labor Relations Act. 29 U.S.C. §§ 185, 187 (NLRA); Pet. App. 8a-10a. The court also noted that Congress had expressly

[2] The court held, however, that it lacked jurisdiction over Karahalios' contract claims against DLI and eventually granted summary judgment in favor of the agency. J.A. 62, 68, 81.

included the duty of fair representation in the CSRA, and provided a remedy for its violation. Pet. App. 11a. Thus, the court explained, there is a "fit between the duty and the remedy provided." Pet. App. 10a-11a. It concluded that Congress intended to channel duty of fair representation claims in the federal sector through the FLRA.[3]

In light of the conflict in the circuits concerning this issue, on June 6, 1988, this Court granted petitioner's request for a writ of certiorari.

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that federal employees' statutory rights to receive fair representation by their unions is properly considered through administrative procedures before the Federal Labor Relations Authority and not in district court. The issue presented here is a narrow one. Contrary to petitioner's insistence, this case does not require the Court to determine whether, in the face of Congressional silence, it is fair to assume that Congress intended to "extinguish" a preexisting judicial cause of action to remedy violations of the duty of fair representation. Pet. Br. at 24. As we show, *infra*, before 1978, federal employees did not possess a judicial cause of action to remedy violations of the duty of fair representation. In fact, decisions concerning violations of this duty were vested exclusively in the Assistant Secretary of Labor and the Federal Labor

[3] Rejecting Karahalios' arguments to the contrary, the court found "insufficient evidence that the FLRA does an inadequate job in protecting the rights of the individual worker in relation to a federal union." Pet. App. 12a. In this particular case, "the FLRA preferred a settlement with implications for all employees in the future to making Karahalios whole." However, as this case demonstrated, "the existence of a district court remedy after investigation and issuance of a complaint by the General Counsel may lead to a tortuous path of litigation whose costs are disproportionate to the individual benefit achieved." Pet. App. 12a-13a.

Relations Council, with no opportunity at all for judicial review.

In this case, then, the question is whether Congress intended to create a private cause of action in 1978 that did not exist before it enacted the CSRA. We submit that it is clear that Congress did not intend to permit federal employees to sue federal sector unions in district court to remedy violations of the duty of fair representation. The language of the CSRA, its structure, and its legislative history all demonstrate that when it expressly included the duty of fair representation in the federal sector labor relations statute, Congress clearly intended to continue to have duty of fair representation claims adjudicated administratively by the FLRA, the administrative body created by the CSRA to handle all labor relations questions in the federal sector. Congress provided virtually no role for the district courts in this scheme. Indeed, the legislative history shows that Congress deliberately decided to limit the role of the district courts in matters arising under the federal labor statute.

Petitioner bases his argument that federal employees should, nonetheless, be permitted to pursue DFR suits in federal court entirely upon analogy to the private sector rule, as set forth in *Vaca* v. *Sipes*, 366 U.S. 171 (1967). We agree with petitioner that the private sector law is generally a good model for interpreting the federal sector labor statute. However, in this case there are strong reasons for rejecting the private sector rule.

First, and most obviously, the federal sector statute, unlike the NLRA, explicitly confers upon employees the right to fair representation by the union, and, it is undisputed that the very same statute creates a specific administrative remedy for its violation. In the private sector, the right to fair representation was implied by the Court, and it was only much later, after this Court had recognized the right, that the NLRB concluded that it

had jurisdiction to remedy violations of the duty of fair representation. In the face of that tardy recognition of the duty, this Court, in *Vaca*, refused to divest employees of their right to proceed directly in district court, a right that had been recognized for more than twenty years.

Moreover, the considerations that impelled this Court to acknowledge the continuing vitality of the employee's private right of action in *Vaca* are not present in the federal sector. The *Vaca* Court was concerned that depriving employees of access to district court could lead to conflicting rules of substantive law; further the Court did not view the National Labor Relations Board (NLRB) as a body that had particular expertise in matters arising under the duty of fair representation. Thus, the reasons usually favoring preemption of court jurisdiction by the NLRB were absent in *Vaca*.

In the federal sector, however, the FLRA, unlike the NLRB in the private sector, has within its jurisdiction not only unfair labor practices, but also "review of the substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and in its handling of the grievance machinery." *Vaca*, 387 U.S. at 181. The FLRA decides negotiability disputes and also has exclusive jurisdiction to review arbitration decisions. It therefore is responsible for many of the matters that the district courts have authority over in the private sector under Section 301. Permitting federal employees to nonetheless pursue DFR complaints in district court would frustrate Congressional intent to channel such issues to the FLRA, the administrative body with the relevant expertise. Moreover, it presents the specter of establishing "conflicting rules of substantive law" between the courts and administrative agencies that was not present in *Vaca*.

Finally, the "unique interests" served by the duty of fair representation—to protect employees for whom union

representation has taken the place of individual forms of redress—are far less important in the federal sector, than in the private. The rights of federal employees in relation to their government employer have never been based upon contract, but rather upon statutes and regulations. The rights granted by the CSRA to organize and bargain collectively supplement, but in many respects do not replace these statutory rights. Indeed, the CSRA preserves the rights of individual employees to pursue their own separate statutory appeals for the most severe employment actions.

ARGUMENT

I. CONGRESS DID NOT INTEND THAT FEDERAL EMPLOYEES ENFORCE THEIR RIGHT TO FAIR REPRESENTATION THROUGH THE DISTRICT COURTS AND THIS COURT SHOULD, THEREFORE, NOT IMPLY SUCH A RIGHT OF ACTION.

A federal union's duty to fairly represent employees is specifically provided for in the CSRA. Section 7114(a)(1) states:

> An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to union membership.

5 U.S.C. § 7114(a)(1). This duty, and other agency and union responsibilities under the labor relations title are enforced by the FLRA, through its unfair labor practice (ULP) jurisdiction. 5 U.S.C. §§ 7105(a)(2)(G), 7118, 7116. In addition to listing specific employer and union acts which are prohibited, Section 7116 also provides that it is an unfair labor practice for a labor organization "to otherwise fail or refuse to comply with any provision of this chapter." 5 U.S.C. § 7116(b)(8). Thus, the statute provides a right and a remedy and the FLRA has, since its inception, used its unfair labor practice jurisdiction to adjudicate charges that unions have violated the duty

of fair representation. *See National Treasury Employees Union v. Federal Labor Relations Authority*, 721 F.2d 1402, 1404-1405 (D.C. Cir. 1983); *Federal Aviation Science and Technological Association, NAGE and Spargo*, 2 FLRA 802 (1980); *American Federation of Government Employees, Local 987 and Bradley*, 3 FLRA 715 (1980).

On the other hand, the CSRA nowhere provides a direct judicial mechanism for employees, unions, or employing agencies to enforce their rights under the labor relations chapter, and there is nothing in the specific language Congress used which indicates an intent to create a judicial cause of action. The issue in this case is whether this Court should nonetheless imply that a private right of action exists, even though Congress has not explicitly provided one.

The general principles which this Court applies in evaluating proposed rights of action that are not specifically provided by statute have been repeated often and recently reaffirmed. The question to be answered is "whether Congress intended to create the private remedy asserted" and the task is "basically a matter of statutory construction." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 16 (1979). The inquiry begins with the language of the statute itself, which may implicitly contemplate or foreclose a remedy. *Transamerica Mortgage Advisors, supra*, 444 U.S. at 18; *Touche, Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). Congress' intent may also be determined by examining the context of the law at the time that the legislation was enacted, to determine the legislature's perception of the law it was shaping or reshaping. *Thompson v. Thompson*, —— U.S. ——, 108 S.Ct. 513, 516 (1988); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 378 (1982). Finally, where the statute grants a particular remedy, which is part of a carefully crafted enforcement scheme, the Court is reluctant to create additional rem-

edies. *Transamerica Mortgage Advisors, supra,* 444 U.S. at 19; *Massachusetts Mutual Life Insurance Co. v. Russell,* 473 U.S. 134 (1985). Each of these basic principles points to rejecting the implied cause of action which the petitioner has asked the Court to establish.

At the outset, it is clear that, as we have noted, the statutory language does not contemplate a private right of action to enforce the statutory duty of fair representation. The law simply requires the union to be "responsible for representing the interests of all employees in the [bargaining] unit" and a law like this which simply "proscribes certain conduct, and does not in terms create or alter any civil liabilities" will not generally be seen as also creating a judicial remedy, especially where "the statute expressly provides a particular remedy or remedies." *Transamerica Mortgage Advisors, supra,* 444 U.S. at 19-20.

Indeed, the overall structure of the statute also plainly evidences Congress' preference that pure labor relations questions be settled in the first instance by the FLRA, with review in the courts of appeals, and never in the district courts. Under the statute, the FLRA has the authority to decide unfair labor practices, to resolve negotiability disputes, and to determine exceptions from arbitrators' awards. 5 U.S.C. §§ 7105(a)(2)(E), (G), (H). Judicial review of FLRA decisions is accomplished, if at all, in the courts of appeals. *See* 5 U.S.C. § 7123. The only statutory role for district courts is to grant temporary relief from an unfair labor practice upon the petition of the FLRA's General Counsel. 5 U.S.C. § 7123(d).

In the face of the specific language of the statute, and its structure, which create both a right and an explicit administrative remedy, petitioner argues nonetheless that Congress contemplated that employees would also enjoy an additional remedy never mentioned in the statute—the

right to sue directly in district court. The legislative history of the CSRA, however, considered in light of the context in which it was enacted, plainly refutes that contention.

Title VII of the CSRA was part of the "comprehensive revision" of the civil service laws Congress undertook in 1978 and it is "the first statutory scheme governing labor relations between federal agencies and their employees." *Bureau of Alcohol, Tobacco, and Firearms v. Federal Labor Relations Authority,* 464 U.S. 89, 91 (1983). While the CSRA contains the first codification of the federal labor relations scheme, Congress was by no means writing on a blank slate in 1978. From 1962 to 1978, labor relations in the federal government was conducted pursuant to Executive Order.[4]

The Executive Order scheme contained many features traditionally associated with collective bargaining in the private sector, such as exclusive representation by unions and proscribed unfair labor practices. Exec. Order 11491, §§ 7, 19, *Legislative History* at 1344, 1347. However, it also had distinctive components, such as its two management controlled administrative review bodies. The Assistant Secretary of Labor for Labor-Management Relations decided unfair labor practice charges. *Id.,* § 6. His decisions were subject to limited review by the Federal Labor Relations Council (FLRC), a review body composed of three executive branch management officials. *Id.,* § 4; *see In re National Association of Government*

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[4] *See* Exec. Order No. 10988, 3 C.F.R. 521 (1962) (January 17, 1962); Exec. Order No. 11491, 3 C.F.R. 861 (1966), as amended by Exec. Order No. 11616, 11636 and 11838; 3 C.F.R. §§ 605, 634, 957 *reprinted in* 5 U.S.C.A. § 7101 (historical note). The Executive Orders are reprinted in the bound legislative history of Title VII of the CSRA. Subcommittee on Postal Personnel and Modernization, House Committee on Post Office and Civil Service, *Legislative History of the Federal Service Labor Management Relations Statute, Title VII of the Civil Service Reform Act of 1978,* 96th Cong., 1st Sess., Comm. Print No. 96-7 (hereafter cited as *Legislative History*).

Employees, 5 FLRC 157 (1977). The FLRC also determined whether particular subjects were within the duty to collectively bargain, termed "negotiability determinations," and reviewed arbitration awards by way of "exceptions". *Id.* §§ 4(c)(2), (3).[5] The decisions of the Counsel were not subject to judicial review. *Bureau of Alcohol, Tobacco & Firearms*, *supra*, 464 U.S. at 92.

There are two elements of the Executive Order scheme which are of particular significance to the issue presented here. First, the Executive Order contained a virtually identical requirement that labor organizations fairly represent all employees in the bargaining unit.[6] This provision was interpreted to create a similar substantive duty of fair representation in the federal sector as the courts had developed over the years in the private sector. *See Local R7-51, National Association of Government Employees and Charles A. Quilico*, 7 A/SLMR 775 (1977); *National Association of Government Employees, Local R14-32*; 4 A/SLMR 849 (1974); *American Federation of Government Employees, Local 2028 and Arthur Williams*, 4 A/SLMR 586 (1974).

Second, before the CSRA was enacted, the judicial role in enforcing the duty of fair representation in the federal sector was vastly different than its role in the private sector. In fact, the judiciary had no role at all before

[5] These concepts along with many other distinctive features of the Executive Order scheme have been incorporated into the CSRA. *See* 5 U.S.C. § 7117(c), 7122.

[6] Section 10(e) provided that:

> When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership. Exec. Order 11491, § 10(e) *Legislative History* at 1345; *compare* 5 U.S.C. § 7114(a).

1978 in federal sector labor relations. As we have noted, *supra* at 12, decisions of the FLRC were not subject to judicial review. In addition, the courts rejected employee attempts to directly enforce obligations granted under the Executive Order in court, both because the Order was not promulgated pursuant to statutory authorization, and because the Order "does not contemplate a private civil action in the federal courts to enforce its terms," either "express" or "implied." *Local 1498, American Federation of Government Employees v. American Federation of Government Employees*, 522 F.2d 486, 492 (3d Cir. 1975).[7]

Thus, when Congress set about to revise and codify the federal labor relations scheme, it started from a model which contained the employee right at issue here, and virtually no judicial remedy for enforcing this, or any other employee rights. Under the CSRA, Congress streamlined the administrative processing of complaints concerning violations of the labor statute. Both the House and Senate versions of the reform bill called for the creation of an independent FLRA, and the Senate Committee explained that this new entity was necessary to eliminate "what is perceived by Federal Employee unions and others as a conflict of interest in the Council" and to eliminate the existing "fragmentation of authority" between the Council and the Assistant Secretary. S. Rep. 95-969, 95th Cong., 2d Sess. 7-8; *Legislative History* at 747-48. The FLRA assumed the unfair labor practice jurisdiction of the Assistant Secretary, similar to the jurisdiction of the NLRB. In addition, the FLRA assumed the Council's jurisdiction over "negotiability" disputes and "exceptions" to arbitration awards. 5 U.S.C. § 7105(a); *see Bureau of Alcohol, Tobacco & Firearms*, *supra*, 464 U.S. at 92-93. In many respects the latter portion of the

[7] *See also, Stevens v. Carey*, 483 F.2d 188, 190-91 (7th Cir. 1973); *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451 (D.C. Cir. 1965).

FLRA's jurisdiction is analogous to the role the district courts play under Section 301 of the Labor Management Relations Act (LMRA). 29 U.S.C. § 185; *See* 5 U.S.C. § 7122(a)(2) (FLRA to review arbitrations on grounds similar to federal courts).

In addition to streamlining the administrative process when it enacted the CSRA, Congress also carefully extended the role of the courts in federal sector labor relations matters. However, the legislative debate surrounding the judicial review provisions demonstrates that the explicit provisions that came out of the Congress were the product of extensive compromise. That legislative history is simply inconsistent with petitioner's assertion that Congress intended to permit federal employees, for the first time, to sue their unions in federal court to vindicate the statutory duty of fair representation.

In contrast to the Congressional consensus on the need for an independent FLRA, the House and Senate bills differed markedly on the role of the judiciary. The Carter Administration's version of CSRA, which was introduced in the Senate and reported by the Committee on Governmental Affairs, provided for no judicial review whatsoever of FLRA decisions. S 2640, 95th Cong., 2d Sess., § 7146(k), *as reported* § 7204(1), *Legislative History* at 458, 513. On the floor of the Senate, S 2640 was amended to allow judicial review of unfair labor practice decisions of the FLRA. 124 Cong. Rec. 514321-22 (daily ed. Aug. 24, 1978). *Legislative History* at 1036-38.[8] The Senate bill provided no role for the district courts, other than a role in the enforcement of FLRA subpoenas. *Id.* § 7179(b), *Legislative History* at 485.

[8] The amendment was proposed by Senator Stevens who argued that judicial review would be available of decisions of the new Merit Systems Protection Board, that unfair labor practice complaints can be just "as serious" as adverse actions, and that judicial review of National Labor Relations Board unfair labor practice decisions is permitted. *Id.*

The House version of the reform bill departed from the administration proposal, and provided for a broader judicial role in the labor relations process. It permitted broad judicial review of FLRA decisions, including decisions on arbitration exceptions. H.R. 11280, 95th Cong., 2d Sess., § 7123, *Legislative History* at 979. In addition, the House bill allowed "any party to a collective bargaining agreement" to directly petition a district court to compel arbitration. *Id.* § 7121(c), *Legislative History* at 978. Taken together, these two provisions would have given the federal courts a significant role in both the enforcement and interpretation of federal sector collective bargaining agreements and the grievance and arbitration procedures they are required to contain. The House bill would have given the district courts a role in federal sector labor relations analogous to the role that they have in the private sector.

In conference, the House and the Senate compromised, with the result closer to the Senate's more limited role for the courts. The conference determined that all FLRA decisions would be reviewable in the courts of appeals, except decisions on arbitration exceptions and appropriate units, which would not be reviewable at all. H. Rep. 95-1717, 95th Cong., 2d Sess. 153, *Legislative History* at 821. The apportioning of unreviewable authority to the FLRA over arbitration matters was enhanced by deleting the House provision allowing parties to petition the district court to compel arbitration. *Id.* at 157, *Legislative History* at 825.

Thus, in its final deliberations, Congress rejected giving the district courts in the federal sector any authority over collective bargaining and arbitration, let alone the authority they possess in the private sector under Section 301. The courts of appeals were granted a definite oversight role in the statutory scheme, but Congress also deliberately rejected a general role for the district court in the day-to-day operation of the federal labor scheme. In-

stead, it granted this role to the FLRA. All challenges to arbitral decisions involving pure grievances must go to the FLRA.[9] Further, the FLRA's decisions reviewing arbitral awards are not subject to judicial review, unless an unfair labor practice is involved. 5 U.S.C. § 7123 (a)(1).

The continuity between the Executive Order and the CSRA is particularly useful in understanding why, as petitioner emphasizes, "there was *no* Congressional discussion of federal court jurisdiction over duty of fair representation cases when the CSRA was passed." Pet. Br. 23 (original emphasis). Petitioner asserts that this silence indicates Congress' intent to incorporate, without modification, the entire private sector remedial scheme for duty of fair representation violations. Pet. Br. at 24. The more reasonable conclusion, however, is that Congress simply intended that the union's duty would continue to be a part of the integrated administrative scheme, as it was before 1978. Certainly, had Congress intended to separate out DFR cases from its new integrated scheme, its intent to do so would have been manifest.

Thus, under the CSRA we have a situation where Congress, in the same statute, specifically identified the union's duty to fairly represent employees, granted the employee an administrative avenue to seek the vindication of that right through the unfair labor practice procedure, and then carefully provided for appellate review of certain agency determinations and arbitration awards, but virtually no direct involvement of the district courts. Given this clear pattern of careful allocation of rights and remedies, it is inconceivable that "Congress absentmind-

[9] Grievances which involve matters which could be appealed to Merit Systems Protection Board may be appealed to the United States Court of Appeals for the Federal Circuit and grievances involving discrimination may be reviewed by the Equal Employment Opportunity Commission. 5 U.S.C. §§ 7121(d), (f).

edly forgot to mention an intended private action." *Transamerica Mortgage Advisors, supra*, 444 U.S. at 20. Rather, it appears that Congress intended to create certain defined judicial remedies concerning a subject over which few, if any, had existed in the past, and that no jusitfication exists for supposing Congress intended that duty of fair representation claims could be brought directly into court.

II. THE REASONS UNDERLYING RECOGNITION OF A JUDICIAL RIGHT OF ACTION FOR PRIVATE SECTOR DUTY OF FAIR REPRESENTATION CLAIMS DO NOT APPLY TO THE FEDERAL SECTOR.

A. Introduction

The petitioner asserts that, because Congress utilized a labor relations scheme for federal employees that is, in many ways, patterned on the NLRA, that the Court should likewise recognize a district court remedy for duty of fair representation violations under the CSRA. We agree with the petitioner's observation that the federal sector labor statute is modeled upon the NLRA and that it is appropriate to look to the private sector case law to interpret the obligations the CSRA imposes. *See National Treasury Employees Union v. Federal Labor Relations Authority*, 800 F.2d 1165, 1168-69 (D.C. Cir. 1986); *Library of Congress v. Federal Labor Relations Authority*, 699 F.2d 1280, 1286-87 (D.C. Cir. 1983). However, to cite that general rule does little to advance the analysis here. In this case, the differences between the procedural frameworks each statute creates render reliance upon the private sector case law inappropriate.

We have already examined in detail one significant difference between the NLRA and the CSRA; the CSRA contains a statutory recognition of the union's duty of fair representation and an express administrative remedy for the employee, a combination that argues against the creation of a parallel judicial cause of action. *Supra*

at 10. The defects in petitioner's argument are not, however, limited to its inconsistency with the structure and history of the CSRA. In addition, this Court's rationale for permitting a judicial remedy under the NLRA, as explained in *Vaca v. Sipes*, 386 U.S. 171 (1967), simply does not apply to the federal labor scheme.

In *Vaca*, the Court confronted the claimed "preemption" of the duty of fair representation cause of action that it had developed over the course of more than twenty years. *Id.; see Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944). In brief, the NLRB had, in 1962, come to the still controversial conclusion that a union's breach of the duty of fair representation violates Section 8(b) of the NLRA. 29 U.S.C. § 158(b); *Miranda Fuel Co.*, 140 NLRB 181 (1962). The Court explained that the preemption doctrine, which forecloses federal court jurisdiction over claims which are "arguably" unfair labor practices, would not be "rigidly applied where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB." *Vaca, supra*, 386 U.S. at 179. Without determining whether the NLRB's position in *Miranda Fuel* was correct, the Court refused to cut off the long recognized right of an employee to enforce this duty in the district courts. The reasons the Court gave, however, counsel against such a remedy under the scheme Congress has created in the federal sector.

B. The Federal Labor Relations Authority, Unlike the National Labor Relations Board, Has Extra Expertise that Makes It the Logical Forum for Resolving DFR Complaints

In *Vaca*, this Court observed that "[a] primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the agency created by Congress for that purpose—is not applicable to cases involving breaches of

the union's duty of fair representation." *Id.* 386 U.S. at 180-181. The Court held that the "need to avoid conflicting rules of substantive law" between the courts and administrative agencies did not apply to the duty of fair representation, because the doctrine had been judicially developed and because "review of the substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and in its handling of the grievance machinery" are "not normally within the Board's unfair labor practice jurisdiction." *Id.* at 181.

In the federal sector, however, exactly the opposite is true. The FLRA's statutory jurisdiction extends not only to the duty of fair representation itself, *see supra* at 8, but to the negotiation positions of the parties and to arbitration matters. *Supra* at 13. Thus, while the FLRA has unfair labor practice jurisdiction patterned after the NLRB, Pet. Br. at 20, it also has a unique, expedited negotiability jurisdiction through which unions present a request directly to the FLRA asking it to "clarify the scope of the agency's duty to bargain." *Federal Labor Relations Authority v. Aberdeen Proving Ground*, —— U.S. ——, 108 S.Ct. 1261, 1263 (1988); 5 U.S.C. § 7117. And, with a few exceptions, the FLRA is the appellate body which reviews arbitration awards, and it thus has an intimate, and unreviewable relationship to the "grievance machinery." 5 U.S.C. §§ 7121, 7123. In short, under the CSRA, it was intended that the FLRA would develop the expertise that the NLRB was said to lack in *Vaca*.

These differences in structure and function are absolutely critical. The determination of whether a remedy granted under one federal labor statute is available under another is not governed by the similarity of the substantive right that is at issue, but by the remedial structure of the two laws. *Communications Workers of America v. Beck*, —— U.S. ——, 108 S.Ct. 2641, 2647

(1988).[10] *Vaca* is grounded on the fact that the type of dispute at issue, involving collective bargaining positions and grievance procedures, is the same type of dispute that the courts would address under Section 301. 29 U.S.C. § 185, *Vaca*, *supra* at 181. As we have seen, however, Congress explicitly rejected this role for the district courts in the federal labor scheme, when it rejected the House bill's provision for district court involvement in arbitration and decided that all arbitration issues would be "considered at least in the first instance by the Authority." H. Rep. 95-1717, *supra*, *Legislative History* at 157.

Were this Court to nonetheless recognize a private right of action under the CSRA, it would create a mirror image of the improper split the Court found would exist in *Vaca*, if a private right of action were *not* recognized under the NLRA. That is, if petitioner's position were adopted, the district courts, which have no role in deciding collective bargaining issues or in the handling of the grievance machinery, would be put in the business of deciding whether unions had violated their duty of fair representation in discharging their responsibilities.

The petitioner misses the point when he argues that the lack of a "Section 301 analogue" in the federal sector is irrelevant to determining the applicability of *Vaca*, because Section 301 is not the basis of federal court jurisdiction over the duty of fair representation. Pet. Br. 26-30. Section 301 is relevant not because it provides the

[10] In *Beck*, the Court explained that it did not have jurisdiction over a violation of Section 8(a)(3) of the NLRA, 29 U.S.C. 158(a)(3), even though it would have jurisdiction over an identical section of the Railway Labor Act, 45 U.S.C. § 152. It is the RLA's lack of an administrative scheme to enforce the rights at issue that created the distinction. The Court went on to hold that it could consider the same issue under the NLRA, however, because it was necessary to decide an independent duty of fair representation claim. *Id.*

basis for the district court's jurisdiction over these claims, (it does not) but because it provides the district courts with the "expertise" that makes them the logical forum to resolve these disputes in the private sector. *Vaca*, *supra* at 181. In the federal sector, it is the FLRA that has the opportunity to develop expertise over collective bargaining, and Congress rejected even a minimal role for the courts in that area.

Indeed, the FLRA has shown no hesitancy in asserting its jurisdiction over allegations that unions have breached the duty of fair representation and has been developing its expertise over this subject since its creation. *See Federal Aviation Science and Technological Association Division, NAGE, and Spargo*, 2 FLRA 802 (1980); *American Federation of Government Employees, Local 987 and Bradley*, 3 FLRA 715 (1980); *National Federation of Federal Employees, Local 1453 and Crawford*, 23 FLRA 686 (1986).[11] In fact, the Courts of Appeal have, on occasion, curbed FLRA efforts to extend the duty of fair representation beyond the collective bargaining arena. *See American Federation of Government Employees v. Federal Labor Relations Authority*, 812 F.2d 1326 (10th Cir. 1987); *National Treasury Employees Union v. Federal Labor Relations Authority*, 800 F.2d 1165 (D.C. Cir. 1986).

While there have been some critics who have claimed that the FLRA has not been sufficiently vigorous in enforcing the duty of fair representation, *see* Pet. App. 11a, cases such as the present one demonstrate that the

[11] The Carter Administration anticipated the passage of the CSRA and created the FLRA in May 1978 in "Reorganization Plan No. 2 of 1978." *Legislative History* at 630; *see* 5 U.S.C. § 901, *et seq.* Even during the period prior to the effective date of the CSRA, the FLRA issued unfair labor practice complaints alleging violations of the duty of fair representation pursuant to Executive Order 11491. *See National Treasury Employees Union v. Federal Labor Relations Authority*, 721 F.2d 1402, 1404 (D.C. Cir. 1983).

FLRA's judgment can be trusted. Far from "falling through the cracks," as the Petitioner claims, Pet. Br. at 38, Karahalios got *exactly* the same result from the FLRA that he got from the District Court. He won a declaration that the union had violated his rights, and *no* compensatory damages, because there is no proof that the union's purported breach actually injured him. J.A. 95. The FLRA cannot be faulted for its resolution of this case and petitioner has not demonstrated that it acted improperly here.[12]

C. In the Federal Sector it is "Practical" to Vest the Federal Labor Relations Authority With Exclusive Jurisdiction Over DFR Cases

The lack of a federal sector analog to Section 301, and the corresponding lack of a role for the district court in federal collective bargaining matters, undercuts another of the reasons the Court cited in *Vaca* to justify district court involvement in duty of fair representation cases in the private sector. There is no "intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts" here, and thus no "practical considerations" favoring district court review. *Vaca, supra* at 183.

Under the NLRA, a claim that the union breached its duty to the employee is "inextricably interdependent" with the claim against the employer under Section 301.

[12] We note here that while decisions of the General Counsel not to pursue a DFR complaint are generally not subject to judicial review, *see Turgeon v. Federal Labor Relations Authority*, 677 F.2d 937 (D.C. Cir. 1982), there may be circumstances under which an employee can seek judicial relief for illegal actions by the general counsel. *Cf. Cutts v. Fowler*, 692 F.2d 138, 140 (D.C. Cir. 1982) (judicial review available to insure compliance with statutory requirement that special counsel perform "adequate inquiry upon which to base its disposition of employee's petition"); *Carducci v. Regan*, 714 F.2d 171, 175 n.4 (D.C. Cir. 1983) (same); *Griffith v. Federal Labor Relations Authority*, 842 F.2d 487, 494 (D.C. Cir. 1988) (judicial review available for constitutional violations).

Delcostello v. International Brotherhood of Teamsters, 462 U.S. 151, 164-65 (1983). The claim against the union is often a "critical issue" in the Section 301 action against the employer and the case the employee must prove is "the same whether he sues one, the other or both. *Id.; Vaca, supra* at 183; *see Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) (union's breach operates to remove bar of finality from arbitration, reviving claim against employer). In the private sector, therefore, it would be inefficient and illogical to bifurcate the consideration of a "hybrid § 301/fair representation claim" by requiring that the union's duty be adjudicated by the NLRB while, or before, the district court considered the claim against the employer.

In the federal sector, the Section 301 half of this hybrid is missing, as this case demonstrates. Karahalios sued both his employer, the Defense Language Institute (DLI), and his union, NFFE. The district court granted DLI's motion for summary judgment, J. A. 81[13], and NFFE was forced to defend the substance of Karahalios' claims against both it and the agency.[14] While the private sector employee always has the option of proceeding

[13] The District Court raised the possibility that the Claims Court would have jurisdiction over an employee's or union's claim that the agency had violated its contract obligations. J.A. 70, 28 U.S.C. §§ 1346(a)(2), 1491. Of course there would be no claim against the union in the Claims Court as the only proper defendant there is the United States.

[14] To establish a breach of the duty of fair representation, the employee must prove both that the underlying agency decision violated the contract and that the union acted in an arbitrary or bad faith manner in processing the grievance. *Clayton v. International Union, United Automobile Workers*, 451 U.S. 679, 683 n.4 (1981); *Vaca, supra*, 386 U.S. at 193. Here NFFE managed to avoid liability for what the district court found to be a breach of its duty by, in effect, rebutting Karahalios' claim against the Agency, that he would have been awarded the position he sought had NFFE taken the case to arbitration. J.A. 95.

against the union alone, *Vaca*, *supra* 386 U.S. at 197, Karahalios would establish this as the only form of district court action, a result that would totally conflict with the "practical considerations" this Court considered so important in *Vaca*. Certainly, if there is one forum where it is practical for these claims to be combined, it is the FLRA and not the district court.

D. Exclusive Representation Does Not Replace "Traditional Forms of Redress" in the Federal Sector

In the private sector, a grant of exclusive representation status to a union deprives individual employees of the right to make and enforce individual contracts with their employers. However, the "unique interests" served by the duty of fair representation, to protect employees who are given a union representative in lieu of their individual "traditional forms of redress," are of considerably less force in the federal sector. *Vaca*, *supra* at 182. In both a theoretical and practical sense, the CSRA rights to organize unions and to file grievances are a supplement to the other rights Congress has granted employees against their federal employer, and do not "strip" employees of preexisting rights.

As a theoretical matter, virtually all employment remedies against the federal government arise from its unilateral consent to be bound; the doctrine of sovereign immunity dictates that the government may only be sued where it has expressly consented. *United States v. King*, 395 U.S. 1, 4 (1969). Thus, federal personnel actions were once viewed as entirely discretionary and not subject to any judicial review. *United States v. Testan*, 424 U.S. 392, 406 (1976). While career federal employees are now protected by a web of statutory and administrative rights and remedies, *see Bush v. Lucus*, 462 U.S. 367, 385-86 (1983), the source of these rights is a statute, not a negotiated agreement between the employer and any employee or group of employees.

When the federal government recognized that the process of collective bargaining would operate in the public interest, 5 U.S.C. § 7101, it granted employees additional rights, but it did not "strip . . . [employees] of traditional forms of redress." *Vaca*, *supra*, 386 U.S. at 182. First, federal employees never had an individual right to negotiate with their employer. Second, many of the terms and conditions of employment which are the traditional province of labor management negotiation, such as wages, fringe benefits, leave, and holidays continue to be set by law and regulation, and are not subject to modification by any individual, union or employing agency. *See* 5 U.S.C. §§ 7103(a)(14)(C), 7117(a). Thus, collective bargaining in the federal government does not involve a significant loss of bargaining power by the individual. Rather, it provides a new avenue for the negotiation of some conditions of employment and, significantly, a new forum for the enforcement of both collective bargaining agreements and all of the laws, rules, and regulations that are not subject to negotiation: the grievance and arbitration procedure. 5 U.S.C. §§ 7103(d)(9), 7121; *see Devine v. White*, 697 F.2d 421, 438 (D.C. Cir. 1983).

Finally, in addition to these differences between the private sector and federal sector, Congress enacted a practical gap in the exclusivity of representation of unions in the federal service. While collectively bargained grievance procedures generally are the exclusive means employees may use to redress employment related complaints, 5 U.S.C. § 7121(a), there are two statutory exceptions to the rule of exclusivity for the most important classes of complaints, disciplinary cases and discrimination cases. 5 U.S.C. § 7121(a), (d), (e); *see Cornelius v. Nutt*, 472 U.S. 648, 652 (1985). For these claims, the employee may use either the statutory appeals process or the negotiated grievance procedure. And, of course, federal employees have employment related rights that arise

under completely independent statutory provisions, which may be pursued outside of the grievance mechanism. *See e.g.* 29 U.S.C. 203(e), 204(f), 216(b) (Fair Labor Standards Act); 5 U.S.C. 552a(g) (Privacy Act). The parallel statutory appeals procedures and the existence of separate causes of action under other statutes insure that employees with the most serious cases have *chosen* to process their complaints through the negotiated grievance and arbitration procedure. Thus, federal employees may in large part avoid the "subordination of individual interests" said to accompany collective bargaining. *Vaca, supra* at 182. It is therefore apparent that this last rationale of *Vaca* like those discussed above, does not support the creation of a private right of action to enforce the federal sector duty of fair representation.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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